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Supreme Court of the United States

OCTOBER TERM, 1942

No. 73

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY, AND MICHIANA ELECTRICAL UTILITY WORKERS ASSOCIATION.

BRIEF FOR INDIANA & MICHIGAN ELECTRIC COMPANY

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BRIEF FOR INDIANA & MICHIGAN ELECTRIC COMPANY

STATEMENT

The brief for the Board, under the heading "STATUTE AND RULES INVOLVED" (p. 2 bot.), omits the following in Sec. 10(e) of the National Labor Relations Act:

> "The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

There is also omitted:

> "Section 12. Any person who shall wilfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both."

and

> "Sec. 2. When used in this Act—
> "(1) The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, . . ."

The brief also fails to mention Article II, Section 5, of the Rules and Regulations of the Board effective July 14, 1939, as follows:

> "After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties') a formal complaint. . . . A copy of the charge upon which the complaint is based shall be attached to the complaint.
> "Whenever the complaint contains allegations under Section 8(2) of the Act, any labor organization referred to in such allegations shall be duly served with a copy of the complaint and notice of hearing. Whenever any labor organization, not the subject of any 8(2) allegation in the complaint, is a party to any contract with the respondent the legality of which is put in issue by any allegation of the complaint, such labor organization shall be made a party to the proceeding."

The examiner did not file his report until July 27, 1939 (R. 53). The motion to intervene of Michiana filed in the Court of Appeals, November 4, 1941, avers (R. 863):

> "that the applicant was not made a party to the proceedings before the National Labor Relations Board, had no notice of said proceedings and was not given an opportunity to be heard at said proceedings."

Omission in the Statement of Reference to the Following, namely, that Without any Mention of Earl Freeman in the Amended Charge or Complaint, the Examiner Relied Heavily on His Testimony and that the Board Did Not Consider Relevant His Alleged Dynamiting of the Company's Plant and Conspiring with Other Members, Witnesses and Officers of B-9.

The "STATEMENT" (p. 3, note 1) does mention that the complaint alleges discharge of Forrest Elkins contrary to Section 8(1) and (3) and that the Board found this allegation not sustained. However, the Statement omits mentioning that in the amended charge it was alleged (R. 31) Forrest Elkins was discharged because of his Brotherhood membership and activity; and that although, in the amended charge and complaint there is no reference to Earl Freeman, the examiner, in his intermediate report, relied very much on the testimony of Earl Freeman to show supposed Company solicitation by Carlton, an assistant general line foreman, and a discriminatory transfer because of Freeman's activity for B-9 (R. 77 bot., par. 61; 79-81, pars. 66 to 70), e. g. (R. 81, par. 69):

> "It seems clear that the real reason for his transfer was his activity on behalf of the union in contrast to the activity of his foreman (Miller) and his foreman's foreman (Carlton) on behalf of the Association. The incident illustrates the power supervisors can exercise —and in this case, did exercise—when they become active in one labor organization and opposed to its rival organization."

and, in par. 70 (R. 81), based on Freeman's testimony of a controversy with Carlton:

"It too illustrates how the employer's support can be and was given to one labor organization through the active support of its supervisors."

See, also, par. 83 (R. 87). Carlton denied these accusations (R. 574-6).

The examiner concluded the company (R. 90)

"by transferring lineman Earl Freeman from one crew to a less advantageous crew, by interrupting and making hostile comments and threats during a certain conversation between employees Freeman and Vandenburg, and by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, as set forth in the above findings of fact, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and Section 2 (6) and (7) of the Act."

and recommended that (R. 91):

"4. In order to effectuate the policies of the Act, respondent take the following affirmative action:

"(a) Offer to Earl Freeman immediate and full reinstatement to his former position as lineman on E. J. Miller's crew, or the equivalent thereof, without prejudice to his seniority and other rights and privileges;

"(b) Make whole the said Earl Freeman for any losses of pay, or losses of remuneration for overtime work, that he may have suffered by reason of the respondent's discriminating, interfering with, restraining and coercing him in the exercise of his rights guaranteed in Section 7 of the Act, by the payment to him of a sum of money equal to that which he would have earned as wages, salary, or compensation for overtime work during the period from the date of his transfer and discrimination to the date of the offer of reinstatement, less any amount he may have earned during such period as wages, salary or compensation for overtime work during such period.

The respondent company in its exceptions to the intermediate report (R. 93) excepted fully (R. 112-14, pars.

46-9) to the examiner's recommendations and conclusions regarding Earl Freeman.* In par. 68 (R. 126) of the exceptions, relating to the bias of the examiner, it is stated:

> "His zeal and partial conduct is especially illustrated in the case of Earl Freeman. After all his evidence was given on direct and cross-examination and he was excused as a witness, he volunteered a statement which had no relation to any charge, thereupon the Trial Examiner inquired of him:
>
> " 'Have you been persecuted?' And in answer the witness volunteered the statement that he had been transferred from one crew to another and lost overtime, he was examined at great length by the Examiner and upon his evidence the Examiner has made a finding of discrimination."

On February 19, 1940, the company filed with the Board a petition to reopen the case and receive further evidence (R. 130). It specifically referred (R. 130, par. 2) to Earl Freeman and other witnesses and stated (R. 132, par. 5) that since February 1, 1940, Earl Freeman and others had been arrested and charged with dynamiting the company's properties and with conspiracy to commit a crime of dynamiting and that he had signed a confession admitting the commission of certain of these crimes. In par. 6 (R. 132), it alleged that all of the persons named in par. 5 (and so including Earl Freeman), in written confessions, stated they had received from John R. Marks sums of money for the commission of said crimes. Par. 8 (R. 133 bot. 4) is a long paragraph relating entirely to Earl Freeman and his complicity with Marks and others in the conspiracy to dynamite respondent's plant.

On February 28, 1940 (R. 135), the Board entered its decision and order containing this paragraph (R. 139):

---

* Exception 66(e) (R. 122 bot.), pointed out there was nothing in the complaint respecting any unfair practice as to Freeman.

"On February 19, 1940, the respondent petitioned the Board to reopen the record to receive certain evidence. We have considered the respondent's petition and find that the matters recited therein have no relation to the issues in this proceeding. The petition is hereby denied."

While the Board did not sustain the examiner's findings respecting Earl Freeman (R. 166-7), the paragraph (R. 139) of its decision and order quoted just above indicate that allegedly the Board's finding respecting Freeman was not based at all on what was recited in the petition to reopen and that Freeman's dynamiting and complicity in the dynamiting conspiracy with Marks and others had "no relation to the issues in this proceeding.". The Board found (R. 165) that

". . . management representatives solicited memberships for the Association, ..."

Apparently, Earl Freeman's testimony with respect to Carlton (notwithstanding Carlton's testimony, R. 569 top) having given him a card without request for it was relied on by the Board.

Omission in the Statement of (a) the Interest and Active Participation of B-9 as a Party and of (b) Its Officers in the Proceedings Before the Board.

(a) **The proceeding resulting in the order is known upon the records of the Board as**

"In the Matter of Indiana & Michigan Electric Company and International Brotherhood of Electrical Workers, Local B-9, Case No. C-1335" (R. 1).

The amended charge is captioned (R. 30):

"In the Matter of
Indiana & Michigan Electric Company,
and
International Brotherhood of Electrical Workers, Local B-9.
} Case No. XIII C685"

Under (R. 31)

> "Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)"

appears (R. 31):

> "(Signed) Samuel Guy,
> Business Manager,
> International Brotherhood of Electrical Workers, Local B-9,
> 130 N. Wells St., Chicago, Ill.
> Tel.: Franklin 1411.
>
> Subscribed and sworn to before me this 12th day of November, 1938, at Chicago, Illinois.
> (Seal) (Signed) Theresa O'Keefe, Notary-Public."

From the Board's Decision it is evident

> "The Board, the respondent, and the Brotherhood were represented and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties" (R. 136).

The appearances at the Examiner's hearing included (R. 171) the attorneys for the Board, for the respondent and

> "Samuel Guy, 130 North Wells Street, Chicago, Illinois, appearing for Local No. B-9, International Brotherhood of Electrical Workers."

The intermediate report says (R. 54):

> "Respondent and the Board appeared at the hearing by counsel; the union appeared by its business manager; all these parties participated fully therein."

Examples of B-9's complete participation are (R. 450):

> "Mr. Seebirt: At this point the respondent offers its Exhibit No. 16.

Trial Examiner Dudley: Mr. Guy, do you have any objection?

Mr. Guy: No.

Trial Examiner Dudley: I overrule the objection of the Board and admit Respondent's Exhibit No. 16 as offered."

and (R. 166):

"Since the Brotherhood did not take exception to the Trial Examiner's recommendations we will not set forth the evidence with respect to Elkins' case in further detail."

The intermediate report under "II. *The Labor Organizations Involved*" (R. 55) included the Brotherhood. The intermediate report recommended (R. 90, par. 2) that the company be ordered to

"cease and desist from interfering with, restraining, and coercing its employees in the exercise of their right to self-organization, to form, join, or assist the International Brotherhood of Electrical Workers, Local B-9, ..."

On November 9, 1939, oral argument was had before the Board in Washington (R. 139).

"The respondent and the Brotherhood appeared and participated in the argument. At the conclusion of the argument, the Brotherhood filed a document entitled, 'Rebuttal to the Respondent's Exceptions to the Intermediate Report and to Other Parts of the Record and Proceedings.'"

The Board

"considered the exceptions and brief filed by the respondent and the document filed by the Brotherhood" (R. 139 bot.).

The Board found (R. 165):

"In short, management representatives coerced employees in regard to membership in the Brotherhood,

and, in order to frustrate it . . . formed, nourished, and led the Association."

The Board accepted the Examiner's findings, except as to Earl Freeman and found in its conclusions of law (R. 169, par. 3), interference, restraint and coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act and unfair labor practices within the meaning of Section 8(1). It ordered the company to desist from [R. 169 bot. (d)]:

"interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, ..."

(including, of course, B-9 as a beneficiary of this order).

(b) Activities of Officers

The statement in the Board's brief says nothing of the testimony on cross-examination of Samuel Guy to the effect that he, Marks, Michael J. Boyle, International Vice-President of the Brotherhood, and an examiner for the Labor Relations Board met with English and Calvert in the Federal Building at South Bend (R. 184-5) in an effort to have the company turn its men over to B-9, in violation of the Act, and that Guy had a second conference with English for the purpose of obtaining his assistance to cause the employees to come into Guy's union (R. 186 top); nor is there mention that the above is not referred to in the intermediate report or in the Board's decision and order.

Contrary to the statement in the brief (p. 50, note 39, and 51), that Guy was not charged with any crime in connection with the destruction of the company's property, the petition to the court below to reopen mentions (R. 130, par. 2) Guy among the officers of the Brotherhood and B-9 and avers that the controversy before the Board was

"an unlawful effort of said officers of said International Brotherhood of Electrical Workers, Local B-9,

> to coerce this respondent to require its employees, in violation of the National Labor Relations Act, to join and become members of said labor union" (R. 131, par. 3).

It is further alleged (R. 133, par. 7)

> "that if all of said confessions are received by this Board that it must conclude therefrom that the officers of said union knew of the commission of said crimes; that the sum of $2,325.00 could not be withdrawn from the treasury of said union for use in the commission of said crimes without their knowledge and participation; . . . and the powers of this Board have been invoked in this cause for the purpose of promoting the unlawful and criminal purposes of those who were instrumental in causing the Regional Director to file the complaint."

Guy, as before stated, swore to the amended charge (R. 31), was a witness (R. 178-88), and appeared for B-9 (R. 171, 450) in the prosecution of the complaint.

Marks, "Assistant Business Manager, Local Unit B-9, I. B. E. W., Northern Indiana Division (R. 188)," was a witness. He was asked (R. 189) on direct examination to

> "describe in general what your activities have been along the lines of organizing this company, if any?"

He did not mention, and had the company then known of, his complicity in the illegal conspiracy; that he paid out at least $2,325.00 from B-9's treasury for dynamiting the company's plant and accompanied the dynamiter (R. 132-3), and that he caused the dynamiting of November 24, 1938, for the purpose of intimidating the company so it would not appear and contest the charges at the hearing to begin four days later, the company could have cross-examined respecting these matters. And, if the Board had granted the petition to reopen, that he committed a crime

under Sec. 12 of the Act, in that he caused other dynamitings which began on September 5, 1939, for the purpose of intimidating the company and to coerce it to require its employees to join his union and so the company would not appear at the oral argument before the Board on November 9, 1939 (R. 133, par. 6), could have been elicited by further cross-examination. The statement in the Board's brief has nothing to say regarding this.

There is frequent reference to Boyle and Marks in the testimony of other witnesses (R. 319, 321, 325, 328).

The petition to refer back (R. 852 bot., par. 3), after mentioning that in the trials of Marks, Freeman and others, it has been established large sums of money, the exact amount unknown, were paid to the convicted persons for the commission of the crimes and to purchase the dynamite used, then avers

> "that a policeman of the city of South Bend, Indiana, will testify that said Marks stated to him that he obtained all of said money from the treasury of International Brotherhood of Electrical Workers, Local B-9."

SUMMARY OF ARGUMENT

I. This is a review of an order made by a Circuit Court of Appeals to the Board to take additional evidence and to reconsider its findings in the light of such evidence. That court is expressly authorized by Section 10(e) of the Act to make such order on a showing to its "satisfaction" that the additional evidence is material and there were reasonable grounds for the failure to adduce it in the hearing before the Board. The jurisdiction of that court is exclusive, subject to review by certiorari. The court was satisfied that the additional evidence ordered to be taken is material. There were reasonable grounds for the failure to adduce such evidence before the Board. The first act of dynamiting was done four days before the hearing before

the Examiner. Though the company may have had suspicions, it had no proof then B-9 was the offender. Most of the other criminal acts were done after the hearing before the Examiner was completed and he had filed his intermediate report and before the hearing before the Board.

The dynamitings were done as part of an illegal conspiracy to prevent employees from bargaining "through representatives of their own choosing" (Act, Sec. 7) and to compel the company to accept B-9 as bargaining agent. The conspiracy included filing a charge of domination and coercion and then, by intimidation of witnesses at the hearing before the Examiner and intimidation of the company prevent defense before the Examiner and the Board. Such acts are, by Section 12 of the Act itself, a criminal offense. Knowledge of the complicity of the Brotherhood, B-9, its officers and witnesses was not obtained until after the hearing before the Board and shortly before the petition to reopen was filed. When the petition to refer back was filed in the Court of Appeals, arrests and confessions of crime had been re-enforced by evidence at the trials of the accused and final conviction and imprisonment in the penitentiary of some of them.

The Court of Appeals was satisfied that the additional evidence, besides being material, would probably lead to a different result (R. 876). A mere possible difference of opinion between this Court and the court below would not be sufficient ground for reversal. Whatever may be the proper limits of review by this Court of the discretion given by the Act to the court below, such review cannot go farther than inquiry if there was an abuse of discretion. The decree of the court entered December 12, 1941 (R. 866) is in general terms and provides:

> "Pursuant to provisions of Section 10(e) of the Act this cause is remanded to the Board with directions to hear and consider such additional evidence as

may be tendered by the parties relating to the destruction of respondent's property by the International Brotherhood of Electrical Workers, Local B-9, or its agents or representatives.

"The Board is directed to make appropriate findings in the light of such evidence and to make such evidence a part of the transcript herein and the Board is also authorized to make such modification, if any, in its present order as the additional evidence may require."

If the remand ordered in this decree is, for any reason, justifiable, the order should not be reversed. The presumption is that the court exercised its discretion wisely, not arbitrarily. If the evidence ordered taken can be material, in any aspect, that is reason for affirming the judgment, even though the court below may have given a different and, to this Court, untenable reason for its decree. *Helvering, Comr. of Internal Revenue,* v. *Pfeiffer,* 302 U. S. 247, 250-1; *N. L. R. B.* v. *Virginia, El. & Power Co.,* 314 U. S. 469.

The evidence ordered taken was material and vital on any one of a number of grounds:

(a) As showing felonious violence as part of an illegal conspiracy by the charging union, its officers and witnesses, of which filing the charge, helping prosecute the complaint, and attempted intimidation of employees, of the witnesses and of the company to prevent proper presentation of the controversy to the Examiner and to the Board, in violation of Sections 7 and 12 of the Act, were parts.

(b) On the issue of company domination.

(c) As reflecting on the credibility of the charge, B-9's part in the prosecution of it and all the testimony of the witnesses.

(d) As affecting the jurisdiction of the Board to act on such a charge.

II. The Court of Appeals did not pass on whether the Board's order was sustained by substantial evidence (R.

876 bot.). Hence, this Court should not at this stage be called on to determine that question. Certainly, if remanding the case for further evidence was proper, there is no need to consider now whether the evidence was substantial. There are other reasons why this Court should not, at this time, and in advance of a reconsideration by the Board and decision on all questions by the Court of Appeals, enter on an inquiry whether the Board's findings and order filed in February, 1940, are sustained by substantial evidence:

(a) Whether there was substantial evidence cannot be properly ascertained without knowledge of the extent to which evidence was colored, prevented, impeded or interfered with by dynamiting and intimidation.

(b) The Association was an indispensable party. It was not made although B-9 was (Rule II, Sec. 5) a party before the Board, and not having the full rights of a party could not adequately make defense (R. 632-33). Moreover, there was no charge or complaint of illegal agreement between it and the company until after the Board had completed its case (R. 123) and the hearing before the Examiner was about ended; and immediately after and because of the decision on December 5, 1938, of *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197, in an attempt to circumvent the effect of that decision. There was no proof of the allegation of the belated amendment that the agreement itself between the Association and the company was illegal. The Board's rules were amended (II 5 effective July 14, 1939) so that the Association would properly have been a party before the Board previous to its decision on February 28, 1940 (R. 135). The request of the Association in the Court of Appeals to be permitted to intervene was (contrary to note 5, p. 6 of the Board's brief) not passed on by that court.

(c) Whether there was substantial evidence should be determined in the light of the bias of the Examiner amount-

ing to want of due process. While the Board is not bound by the Examiner's report, the purpose of having an Examiner is to enable the Board to use an impartial summary of the evidence for findings and action based on the report. In many ways, the Examiner clearly showed his extreme partiality. For example, during the hearing on December 2, 1938, before the company's evidence had been received, he suggested a settlement to the company's lawyer by an order to disestablish the Association. He was told of the dynamiting on November 24, 1938, and of the suspicion regarding who were the perpetrators and the purpose thereof, of the unsavory record of Michael J. Boyle and other B-9 officials with federal court and other references, and of their use of the Act and Board to promote their own selfish ends, and his reply was

> "Well, your company will be required sometime to recognize B-9 and you might as well do it now" (R. 853).

This shows he recognized disestablishment of Michiana would help establish B-9. If it is said the company should have reported this unseemly conduct of the Examiner to the Board rather than make it the subject of exceptions to the report, the bias of the Examiner amounted to a want of due process, and, if not, his partiality in the hearing and in his presentation of his summary of the evidence to the Board should be taken into account.

(d) More than two and one-half years have elapsed since the findings of the Board were made. The period without final result is due to the Board itself. The petition to refer back shows [R. 853-4, pars. (a) to (e)] that before and after the decision of the Board, efforts were made by a field examiner, the trial examiner, different attorneys for the Board and a regional director, the last attempt being August 28, 1940, to induce the company to cause Michiana

to be disestablished and, in some of the instances, to recognize B-9 as bargaining agent in violation of Section 7; this, although in each instance, the company gave its reasons for refusing. The petition for enforcement was not filed until December 13, 1940 (R. 1), an interval of almost ten months from the date of the Board's order (R. 135). After the decision and decree of the court below filed December 12, 1941, the Board did not submit a petition for rehearing or ask further time within the thirty days prescribed by the court's rules, but allowed more than sixty days to expire before filing a motion for leave to file a petition for rehearing out of time (R. 885). This motion was on March 5, 1942, denied because of no sufficient cause being shown for failure to comply with the court's rule 28 (R. 887). The petition for writ of certiorari was not filed until April 11, 1942. That slight delay may result from affirmance of the order of remand is no reason for interfering with the discretion of the court below in ordering remand. Certainly, it is not a suggestion that can be urged persuasively (Br. p. 50) by the Board which is responsible for far greater delay. The agreement between the company and the Association has been carried out and renewed from time to time. The record of actual experience would be very helpful to determine whether, in truth, Michiana was company dominated or whether it was and has been independent and an adequate representative of the employees of their own free choosing. *N. L. R. B.* v. *Goodyear Tire & Rubber Co. of Alabama*, 129 F. (2d) 661 (C. C. A. 5).

(e) While the Board is the judge of the relief it will afford, this experience and the changed conditions and what it will have learned of B-9 by evidence should influence it to reconsider whether it would wish now to give the relief granted in 1940. It ought not grant relief which will create an intolerable situation and not effectuate the purposes of the Act. The Board's brief seems to con-

cede (Br. pp. 38, 46) relief should not extend to require dealing with a union guilty of grave illegal conduct.

III. If the Court is of opinion that it should review now the question whether there is substantial evidence to support the finding of the Board, then it will be submitted the decision and order of the Board are not sustained by such evidence.

ARGUMENT

I

THE DECREE SHOULD BE AFFIRMED. THE COURT OF APPEALS EXERCISED AND DID NOT ABUSE ITS DISCRETION IN REMANDING THE CASE TO THE BOARD FOR THE TAKING OF EVIDENCE CONCERNING DESTRUCTION OF RESPONDENT'S PPROPERTY BY THE BROTHERHOOD, ITS OFFICERS AND MEMBERS

In *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 104, this Court held an application for leave to adduce additional evidence pursuant to Section 10(e) is addressed to the sound judicial discretion of the Court of Appeals. The granting of respondent's petition for remand was, therefore, not reversible error; certainly not unless it constituted an abuse of discretion.

(a) and (b) The question is whether a union may use the processes of the Act, including the filing of a charge and participation in a hearing following such charge, in furtherance of an unlawful conspiracy to prevent a defense to the complaint based on its charges and to compel recognition of such union by terrorism, in violation of the purposes and provisions of the Act.

In *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 46, 48, it was said the discretion of the Board has some limits and must be used to "effectuate the policies of the Act." There, seamen who had mutinied were held, by reason of acts condemned by the Congress as crimes, to have

forfeited the status of employees; and the Board was declared to be without power to order them reinstated. In *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, the constitutional right of peaceful picketing was lost by violence and illegal acts and all picketing was enjoined. The *Southern Steamship* case decided that the Act is to be interpreted with "other and equally important Congressional objectives" (p. 47 top) expressed in other federal laws defining crimes. Here what was done by a party to the proceedings, B-9, the charging union, its officers and members, was a crime under Section 12 of the Labor Act itself, as well as a felony under the laws of Indiana. Of course, whoever commands or procures a crime to be permitted is guilty of a crime: the act is his act. *O'Malley* v. *United States*, 128 Fed. (2d) 676, 682-3 (C. C. A. 8), now pending on other points on certiorari in this Court. The Court of Appeals' interpretation of the Labor Act that B-9 could not under Sec. 2(5) file and prosecute a charge as part of an illegal conspiracy to violate the Act itself, is sound.

The suggestion on behalf of the Board that the doctrine of *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, to the effect courts may withhold aid where the right asserted concerns (p. 493) and is used contrary to the public interest (p. 492) is not applicable here because the Board is not a court and is not enforcing a private right, is specious. B-9 was actually a party to and active in the proceedings and a beneficiary of the order of the Board forbidding interference with B-9 and disestablishing Michiana. Obtaining such disestablishment and the forbidding of interference with B-9 was a necessary step in the illegal design to force itself in as the bargaining agent.

The unlawful conspiracy was formed by the Brotherhood even before the time of making the charge by B-9 through Guy. He and Marks went to South Bend, once at

least with Boyle, and held no less than three conferences with English, respondent's vice-president, or with him and other officers of the company (R. 180, 182, 184). Guy testified that his purpose was to induce English to cause the employees to come into the Brotherhood rather than into a C. I. O. or an independent union (R. 186); thus his purpose was to cause the respondent to coerce its employees so as to prevent exercise of rights guaranteed to them in Section 7 of the Act, and in violation of Section 8(1). When these attempts at coercion failed the Brotherhood filed the charge on November 12, 1938, and committed felonious acts of violence in furtherance of its unlawful purpose. It was all part of an illegal scheme.

Twelve days after filing the amended charge and four days before the time fixed by the Board for hearing the complaint based on the charge (R. 34-5), the Brotherhood began its campaign of dynamiting and terrorism by exploding a dynamite bomb in one of the respondent's sub-stations (R. 131, 852). Before September 8, 1939, oral argument was set before the National Labor Relations Board at Washington, and was continued to November 9, 1939. For the purpose of intimidating respondent so it would not appear at the oral argument and in violation of Section 12, to intimidate it against making further resistance in the case, six other crimes of destroying and dynamiting the respondent's poles, towers and transmission lines were committed at the procurement of the charging union between September 8 and October 30, 1939 (R. 131-2); this campaign of coercion by the commission of crimes against respondent and its property continued until November 23, 1939 (R. 132); high voltage lines along public highways and railroad tracks were dynamited (R. 132); the destruction of transmission lines serving the Bendix Aviation Corporation, engaged in war work for the United States Government, was attempted (R. 853).

Respondent's petitions allege that there was withdrawn from the treasury of said Brotherhood the sum of $2,350.00 or more which was paid to the criminals who committed these acts; that the officers of the Brotherhood must have known of such payment, and therefore that they participated in the crimes (R. 132, 852). The petition to remand states that Marks, Earl Freeman and another were convicted in the Elkhart, Indiana, Circuit Court of one of the criminal acts of dynamiting respondent's property (R. 852). This judgment of conviction was affirmed by the Supreme Court of Indiana on March 17, 1942 [40 N. E. (2) 108], and their guilt has been finally and conclusively determined. The petition to remand states facts showing the commission of all the crimes by the officers and agents of the Brotherhood. The petition also states that respondent did not know certainly at the time of the hearing that these persons had committed and procured the commission of these crimes.

The petitions do not rely merely upon acts of violence committed by individuals who happen to be officers or members of the Brotherhood, but present facts showing direct responsibility and culpability of the union itself. It is stated that the commission of the acts was procured by use of the union's money, paid from its treasury and that there was, therefore, a participation in the crimes by the officers of the union, and by the union itself. The petitions show, indeed, that the very conception of the charge filed with the Board to confer jurisdiction upon it, was part of a conspiracy, first, to induce the respondent to commit an unlawful act, viz: to coerce its employees into membership in the union, and second, to engage in terrorism against respondent's property and against the lives and security of the community served and of the witnesses, so as to bend respondent's will in its favor, and to require respondent to terminate its resistance to the Board's action, and coerce

its employees into the union as the price of saving its property. This is a crime under Sec. 12 of the Act.

Section 10 (b) provides that whenever it is charged that any person has engaged in any unfair labor practice, the Board shall have power to issue and cause to be served upon such a person a complaint. Article II of the Rules of the Board provides that the charge may be made by any person or labor organization. The Court of Appeals held that the Board has no jurisdiction until a charge is filed, and that it may be filed by employees, under certain conditions, or an agency or employee representative committee in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work (R. 874). This is the definition of "labor organization" as contained in Section 2(5) of the Act. The Court in legal effect held that the Act and the Rule require that the charge must be filed, to effectuate the purposes of the Act, by a labor organization "which exists for the purpose . . . of dealing with employers concerning grievances . . . ," etc. This was a sound interpretation of the law. "Dealing with employers" imports lawful and not felonious dealing with them.

Opposing counsel assert Board orders have been enforced despite misconduct of the union which had invoked the processes of the Board by filing a charge, citing such cases as *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31. But in none of them was the union itself, through its executive officers and through the criminal use of its own funds, guilty of such a criminal conspiracy and offense under the Act itself (Sec. 12). A so-called union, which destroys the employer's property, jeopardizes the lives of people of a community, wilfully interferes by terrorism with defending before the Board and sabotages the efforts

of the government to secure its self-defense, as part of an unlawful scheme to cause an employer to coerce its employees to become members of it, can no more be accepted as a "labor organization" under the Act, than can a person who seizes his employer's factory be regarded as an "employee." Such a union does not exist for the purpose of promoting the purposes of the Act. In the *Fansteel* case, *supra* (pp. 257, 258), this Court said:

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force or violence in defiance of the law of the land."

And it was there held that employees who committed or aided and abetted in the commission of felonious acts of violence did not enjoy the status of employees.

Counsel for the Board concede that if the question were whether respondent had to bargain collectively with the Brotherhood, the evidence sought to be adduced would be relevant, but argue that the Brotherhood, as the charging union, was not the beneficiary of the Board's order (p. 38). This ignores the realities of the situation. The attempt of the Brotherhood to strike down the Association was merely one of the steps in the criminal conspiracy created by the union itself to compel respondent to recognize it, even though, as the Court of Appeals found, the Brotherhood had only twelve members out of the company's one thousand employees (R. 874). It is shutting one's eyes not to recognize that the act of filing the charge, following respondent's refusal on Guy's demand to coerce its employees to come into the Brotherhood, was part of this unlawful conspiracy to compel recognition of itself, as the bargaining agent, and to destroy the protection to self-organization secured to employees by the Act.

As well said in *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 112 Fed. (2) 545, 549 (C. C. A. 5):

> "While a proceeding of this kind takes on the form of a charge against an employer, the real substance and design of it is, to seat one labor organization over another, with the greatly unjust result, if the decision of the labor board is wrong, of depriving employees of the very rights the Act guarantees to them."

The argument (Br. 42-3) that the Congress did not prohibit union violence in the Act is answered by reference to Sections 2(1) and 12. B-9 is a "person" and the dynamiting was a wilful resistance, impediment and interference with a hearing before the Examiner and the Board. Nor is the argument impressive (Br. id.) that if the Board were required to investigate asserted misconduct of the charging union as a prerequisite to the taking of jurisdiction, this would put an undue burden on the Board. The Board ought of its own motion investigate a case such as this, so that it will not be imposed upon and asked to bring about a result that will not effectuate the purposes of the Act, safeguard commerce from injury, remove industrial strife and permit employees to bargain by an agent of their own voluntary and unterrorized choosing. The burden of proof to show disqualification to file the charge would be on the respondent attempting to establish it; as is the case where a corporation seeks to show that a stockholder is not, for improper motives, to examine its books, or a supposed taxpayer is maintained in his suit, or for other disqualification, may not sue to enjoin an abuse of corporate power.

What B-9, its officers and members did was really a contempt of the Board, whether punishable as such by the Board or not. It was as contemptuous as the acts of Pendergast and others detailed in *United States* v. *Pendergast*, 35 F. Supp. 593, 39 F. Supp. 189, and *O'Malley* v. *United States*, 128 Fed. (2d) 676 (C. C. A. 8). In our mention of these cases, which we know are pending before this

Court, we are not, of course, undertaking to discuss whether the acts described in them are punishable under the federal statutes relating to contempts. In *Nye* v. *United States*, 313 U. S. 33, referred to in these cases, the reprehensible act of causing a litigant, by improper means, to dismiss his case was held not punishable under the federal statute. We mention the cases merely as illustrative of the principle that anything which interferes with the orderly administration of justice is contumacious, whether punishable or not under the federal statute. B-9 and its officers and members seeking by terrorism and sabotage to prevent respondent from making a defense and presenting as credible witnesses who had committed the crimes of violence, is just as much contumacious as were those who, in the *Pendergast* case, caused the court to enter a decree by deception, or who, in the *Nye* case, basely induced the plaintiff to dismiss his suit. Why should a court or administrative agency, when such acts are called to its attention under oath (R. 855), be interested in investigating and, if found true, causing punishment, if possible, for such interference with the administration of justice? Not merely to uphold the dignity of the court or agency, but to prevent interferences with the ascertainment of the truth.

If the Board could not see the plain duty, even apart from Section 12 of the Act, to learn whether it had been deceived, whether its processes had been abused and whether they had been invoked in aid of an illegal criminal conspiracy and in an effort to intimidate a party from presenting its defense and witnesses from testifying without danger to themselves, surely upon the facts being submitted under oath in the Court of Appeals it was no abuse of discretion but a duty, when the Board sought to enforce its order, to direct the Board to reopen the case and take cognizance of the tendered facts, confirmed by testimony

in the criminal trials of some of the witnesses and final convictions. While the case before the Board for reopening was plain, it later, on reaching the Court of Appeals, became certain, because of testimony in the criminal trials and convictions. It is a remand for these reasons which the Board seeks to invalidate here.

(b) As the Court of Appeals found, the question whether the conduct of certain supervisory employees in connection with the formation of the Michiana was attributable to respondent or whether these employees were acting on their own behalf and on behalf of their co-employees is the crux of the case. The Court of Appeals gave as one of the reasons for ordering a remand that "the new evidence may throw some light on employer domination" (R. 876). Indeed, the Court of Appeals deemed the new evidence of such a character "that its consideration by the Board would probably produce a different result" (R. 876).

Boyle and Guy were principal officers of the Brotherhood. In support of the charge of unfair labor practices, the Examiner cites the testimony of "Samuel Guy, the Union's business manager" and of "the Union's business manager Mr. Guy and his assistant, John R. Marks" (R. 56-7).

The petition of the company before the Board to reopen the case to receive further evidence (R. 130, par. 2) refers to Michael J. Boyle, of Chicago, Illinois, International Vice-President; Guy, Business Manager; and Marks, Assistant Business Manager, and alleges that Guy, Marks and Earl Freeman were witnesses who were called by the Board, whose testimony was received by the Examiner and relied upon and accepted by him in making his findings and Intermediate Report.

The Board's brief states there is no allegation that Guy was charged with or convicted of any crime in connection

with the destruction of respondent's property (Board's brief, p. 50, note 39). On the contrary, it was asserted (R. 133, 852-3) and will be contended that Guy gave the money used for the dynamiting from the treasury of the Brotherhood and must have known for what Marks and others used it. The conviction of various witnesses including Marks, Assistant Manager, with the evidence likely to show complicity of other officers of the union, would be a confirmation of the fears and suspicions of the employees—the moving cause of their forming their own union rather than allying themselves with persons that they had good reason to suppose used felonious measures. The evidence which the Court below ordered the Board to receive will also show continuation of a course of unlawful conduct and ground for reasonable anticipation of the employees that the Brotherhood was not an organization with which they desired to associate themselves.

The brief's "short answer to this contention". (Br. 35, note 29) that the Company, at no time prior to its brief in opposition to the allowance of certiorari, advanced this as a ground for taking additional evidence, is inaccurate. This ground was elaborately argued to the Court of Appeals. However, as before shown, if it had not been argued at all, but is a sound reason for the remand; or, if not, if there was any other reason for the Court's exercising its discretion to order a remand, the decree of remand is to be sustained.

Nor is it correct for the Board to argue (Br. id.) that the company did not offer to prove employees' distaste for the Brotherhood's tendency toward unlawful activities motivated organization of the Association.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (259 Fed. 803) sustaining the conviction of Boyle had appeared long before his efforts to bring the company's employees into his union. In "Housing Amer-

ica" it was stated ("Umbrella Mike") Boyle collected two thousand dollar fees for temporary electricians' cards in Chicago. In an interview by Cleveland's Safety Director Ness, appearing in the "Cleveland Plain Dealer" of November 17, 1937, he told of how persons he approached for information about union racketeering "were fearful of business reprisals" and that "one union member told him that at least three-fourths of his local would, if the members were not afraid, march down in a body to my office to tell about the conditions." Henderson testified that in May, 1937 (R. 393),

> "there was considerable write-up in the paper about various labor troubles. . . ."

Holmes testified that when the men were forming the Association and asked him to take the chairmanship (R. 222 bot.):

> "A. Well, there had been various things from time to time had come out, what was back of the Association.
>
> "Q. Well, what was that? I want to know what you found out.
>
> "A. Well, there were several reasons; outside organizations coming in creating a disturbance and jeopardizing the present working conditions they had, and I don't know this but by hearsay, the amount of dues would be"

greater, and:

> ". . . I had always been more or less conversant in labor matters, anyway, from reading the newspapers and periodicals." (R. 223.)

The men (R. 245):

> ". . . did not want to be forced into an outside organization against their will to pay dues which they considered excessive. . . ."

Only Marks lived in Indiana. Five other officers of the Brotherhood lived in Chicago (R. 183). Edgell (R. 200) said the reason for the Association was so the men could handle their own affairs and get away from high dues. LaVelle testified (R. 502 bot.) "one reason" for forming Michiana was they did not wish to pay the big dues of the outside unions. Calvert told of a meeting in the spring of 1937 with Guy and Marks and then of a second meeting with Hays, Examiner of the Labor Board; Boyle, Guy, Marks, English and Deahl, and (R. 591):

> "A. The statement was made then finally, that, the Examiner made a statement to this effect, that the solution of the problem seemed to be to withdraw our recognition of the Michiana Association, and he asked Mr. Boyle as to his ideas.
>
> "Mr. Boyle said, 'I guess that is about it.'
>
> "Trial Examiner Dudley: Who is Mr. Boyle?
>
> "Q. (By Mr. Seebirt): Michael Boyle of Chicago?
>
> "A. Yes.
>
> "Trial Examiner Dudley: Union organizer?
>
> "Mr. Seebirt: He is vice-president, isn't he?
>
> "The Witness: I believe he is vice-president of the——
>
> "Q. (By Mr. Seebirt): Vice-president of the I. B. E. W.
>
> "A. Yes, I. B. E. W.
>
> "Q. Go ahead.
>
> "A. I was going to state in there, as I recall it, neither Mr. Guy or Mr. Marks participated in the conversation. The conversation was principally between the Examiner with the statement of Mr. Boyle, and ourselves."

Employees who testified, with Guy and Marks present, may well have been restrained in their testimony regarding possible distaste for Boyle and his methods. They might have suspected the dynamiting four days before the hearing began was done as an example of what could be done to those who might express themselves too freely.

They doubtless had a strong suspicion that Guy and Marks had caused the dynamiting and were familiar with Boyle's methods. The company, if it had any regard for the safety of its men, could not, even if it had had certain knowledge, safely examine them as to their knowing the criminal tendencies of B-9 and as to their wish not to ally themselves with it for that reason.

In the normal course of procedure this case would have been filed for enforcement in the Seventh Circuit where substantially all the acts complained of were done and where the company did by far the most of its business and where the hearings were held. But it was filed in the Sixth Circuit—perhaps in view of the Seventh Circuit having expressed itself so strongly regarding Boyle. In sustaining his sentence for a year's imprisonment plus a fine of $5,000 for violation of federal laws, that Court, in *Boyle* v. *United States*, 259 Fed. 803, 808, after reviewing some of the evidence of Boyle's having made builders pay him sums of money under threat of a strike or boycott, said:

> "Plaintiffs in error contend that this evidence was not only inadmissible, but highly prejudicial to their cause. That such testimony, if erroneously admitted, was prejudicial, must be conceded.
>
> "for it requires no stretch of the imagination to conceive of a jury taking a prejudice against a party who is thus pictured in the role of a blackmailer, a highwayman, a betrayer of labor, and a leech on commerce. But the test of admissibility does not turn upon its effect upon the jury, but on its relevancy to the issues made by the charges set forth in the indictment."

When Guy testified regarding a conference with English and Calvert, at which Marks and he were present and also Mr. Hays, an examiner of the Labor Board, he at first omitted mentioning that Michael J. Boyle, Interna-

tional Vice-president, was also present (R. 184-5). It is a fair inference that the employees were just as fearful of the Boyle repute as the Board was.

In *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80, it was said the employer may be held to have assisted in the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior* where employees would have just cause to believe that the solicitors professedly for a labor organization were acting on behalf of the management. So, conversely, what the employees may reasonably have had in their minds regarding the union's seeking to compel them to join was proper to be considered. *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 177 (C. C. A. 7). Chicago and South Bend are not far apart and self-respecting employees in South Bend knew perfectly well the methods employed by Boyle and his associates in Chicago and elsewhere. The acts of dynamiting, the confessions and convictions were confirmation of their fears and proof that these felonious acts were not ancient history, but amounted to a settled course of conduct of the union which they were being importuned by Boyle and others to join.

If the complaining union would not hesitate to dynamite company property, it would not hesitate to commit violence upon those who might not testify according to its wishes. It is not difficult to imagine the atmosphere of fear in which the hearing was conducted. The Board should have considered the evidence in the light of such a situation, but it dismissed the proffered testimony curtly by saying (R. 139) it had no relation to the issues. That condition of terrorism no longer exists and after remand now the employees may be able to relate without restraint why they formed the Association.

(c) The remand was proper since the proffered evidence was material on the issue of the credibility of the Board's principal witnesses. It should be noted that the evidence concerning the wanton destruction of respondent's property will relate not only to Marks and Earl Freeman, who were tried and convicted in the Indiana State courts, but also to Guy. It may also be developed that other witnesses had a part in or were influenced by it. Marks was active before (R. 321 top, 328 bot., 262-3) and throughout the hearing and was not merely a witness. It is inconceivable that Marks, the Assistant Business Manager of the Brotherhood, could have withdrawn substantial sums from the union treasury for dynamiting respondent's property without Guy, the Business Manager of the Brotherhood, having had knowledge of it. So, it is not merely a question of credibility of certain witnesses, but the credibility of the whole charge and of all the witnesses who were marshaled by Guy and Marks.

A finding of unfair labor practice made by the Board against respondent was that respondent dominated and interfered with the formation and administration of the Association (R. 165), and that two supervisory employees "whose activities are attributable to the respondent" were guilty of surveillance at a Brotherhood meeting (R. 142-3). Whether the conduct of these employees constituted such, and in any event, whether their acts were attributable to respondent was an important issue, the determination of which largely influenced the making of the finding as to domination of the Association.

The Trial Examiner accepted as true the testimony of both Guy and Marks that they called upon Thomas F. English, vice-president and general manager of respondent, and Charles B. Calvert, its assistant secretary, with respect to organizing the employees, and that English stated "that he thought his employees were well paid, satisfied, and

without any need of a labor organization" (R. 57). Guy and Marks were the only witnesses who testified to these facts. Both English and Calvert testified that they never directly or indirectly advised or urged the employees to refrain from becoming members of the Brotherhood (R. 610, 624). This testimony of Guy and Marks was accepted by the Trial Examiner as showing opposition by respondent to the organization of its employees in the Brotherhood (R. 57(6)) and as establishing anti-union bias on the part of respondent. In the entire record, there is no other evidence indicating any opposition or hostility on the parts of respondent's executive officers against the organization of its employees in any particular union. The evidence sought to be taken on the remand relates, therefore, to the testimony of Guy and Marks on a most material issue, and is not cumulative.

As the Court of Appeals stated in its opinion (R. 876):

> "The Trial Examiner accepted the statements of these witnesses as true and the ultimate facts based on their testimony were material to the Board's decision."

The proffered testimony on the remand would also have a direct bearing on the credibility of the Board's witness, Guy, on the issue of alleged company surveillance. There had been a general invitation to all employees to attend a meeting of the Brotherhood in April, 1937 (R. 481, 576) and foremen were eligible to membership in the Brotherhood. Livelsberg and Carlton, two foremen, drove to the place of the meeting but did not go in. Guy testified that he invited Livelsberg and Carlton into the meeting where they could hear what was said (R. 181) and that Carlton replied "he would get that information anyhow." The Board's brief mistakenly states (p. 50) that Guy's testimony was substantially corroborated by the testimony of

Livelsberg and Carlton and by two other witnesses Livelsberg testified that he went because of a general invitation, that he saw only seven or eight employees there and that because he did not see anyone there with whom he had been associated for years, he did not go in (R. 480, 484). His testimony was that he did not talk with Guy at all (R. 480-1). Carlton said that he went out for his own benefit and he denied that he told Guy "he would get the information anyhow" (R. 578).

The two other witnesses whom the Board indicates corroborated Guy's testimony are Claeys and Hoblitzel. Claeys testified to no fact except that he saw Livelsberg and Carlton and Hoblitzel in an automobile at the place of the meeting, but he heard no conversation (R. 348, 350).*

Hoblitzel testified that he saw Livelsberg drive by and after parking his car, came back to Carlton's car, where they talked generalities; that Guy came over and cordially invited Carlton into the meeting and that Carlton replied he would get the information in the morning. Thus, independent of Guy's testimony, there was only one witness, Hoblitzel, a member of the Brotherhood, who testified as to this conversation and he was disputed by Carlton. So, if there was any evidence that respondent was guilty of espionage or surveillance, such evidence is exceedingly tenuous. As the Court of Appeals said, the taking of additional testimony by the Board, pursuant to the remand, would probably produce a different result (R. 876).

Moreover, during the hearing before the Examiner, Guy and Marks may have suggested Shields, Edwards, Free-

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* In the Board's brief, it is sought to create the suggestion that the presence of Livelsberg, Carlton and Hoblitzel had a "coercive effect" on the employees (p. 12) and quote the testimony of Claeys that as soon as he saw them he "wanted to get out of there" (R. 349). But the Board's brief does not mention that Caleys, instead of "getting out," actually went into the meeting (R. 349-350). Moreover, Hoblitzel, although a foreman, was then a member of the Brotherhood (R. 277) and his presence in the car with Livelsberg and Carlton must necessarily negative any inference of either spying or surveillance.

man, Otis, Buckley, Hulwick, Elkins, Ernst, Durfey, Seeley, Kidder, Claeys and Havlin as witnesses. Opportunity should be given to determine whether others of these besides Freeman knew of B-9's dynamiting or were parties to the criminal conspiracy. At the time of the hearing, respondent could not, because it did not possess any definite information, develop any connection of any of these witnesses with the dynamiting plot. Certainly, many of the findings of the Board had support, if at all, upon the testimony of these witnesses. Opportunity should be given to show what fear they may have had or knowledge of the criminal plot and whether they were parties to it. Thus, the credibility of many of the Board's witnesses may be involved.

To what extent the testimony of the various witnesses was motivated by the atmosphere of violence resulting from the Brotherhood's conduct is an important factor and would be developed at length when opportunity to take the additional testimony before the Board will occur.

In the Board's brief (p. 49) an attempt is made to minimize the importance the testimony of Guy, Marks and Freeman and opposing counsel state that the Board did not deem much of this testimony of sufficient consequence to designate it for printing. The reason for this is understandable. At the time of petitioner's designation of the record (Dec. 13, 1940), the Board had been informed of all of these acts of dynamiting and destruction of respondent's property and had been formally notified that the officials of the Brotherhood were responsible for these acts (R. 853). Naturally, when it came to designating the portions of the transcript and record to be made a part of the printed record, the Board's attorneys sought to eliminate much of the testimony of these Brotherhood officials; indeed, they designated none of the testimony of Marks and Freeman and very little of the testimony of Guy. It was

necessary for respondent to cause more of the testimony of these principal witnesses of the Board to be made a part of the printed record (R. 19-29). But it should be remembered that the Board had already made its findings and order upon the entire transcript, including the Trial Examiner's report. Therefore, the argument that the Board did not rely upon much of this testimony because later its attorneys did not wish it to be included in the printed record, is not weighty.

In the Board's brief, it is also urged that the testimony that will be tendered on the remand is cumulative and that therefore, the remand is unwarranted (pp. 36, 49). We have already shown that much of this evidence is not cumulative. Moreover, it is a familiar rule that to render evidence subject to the objection that it is cumulative, it must be cumulative, not with respect to the main issue between the parties, but in respect to some collateral or subordinate fact bearing on that issue (Am. Jur. Sect. 173, p. 179). Far from bearing on collateral or subordinate fact, the additional testimony sought to be obtained will have a direct bearing upon the principal questions at issue, such as the claims of coercion, espionage, surveillance, company domination and the attributing to respondent acts of minor foremen, carrying with it, necessarily, the question as to the state of mind of the employees concerning these acts. Furthermore, if the new evidence, even though cumulative, is sufficient to make it probable that a different finding will be rendered, or to make clear that which was doubtful, then it should be received, and it is not an abuse of discretion to remand. See 46 C. J., pp. 261-267; 39 Am. Jur., Sec. 165, p. 172. The Court of Appeals was of the opinion that the new evidence is of such a character that its consideration would probably produce a different result. It is not necessary that such new evidence should be such as to require a different result, but there must be a probability

that a different result will be produced. Certainly, in view of the nature of this evidence, the conclusion of the Court of Appeals as to such probability is wholly justified and cannot constitute an abuse of sound discretion.

The question is not analogous to the rule controlling courts in passing upon motions for new trials because of newly discovered evidence. And none of the cases cited in the Board's brief (p. 52) in which the trial court denied motions for new trial is in point here; for, in those cases the court of review based its ruling upon the broad discretion of the trial judge, and upon the point that it could not be said the court abused its discretion. Indeed, they are authority for this Court upholding an exercise of discretion expressly conferred by Section 10(e) on the Court of Appeals. *Holgren* v. *United States*, 217 U. S. 509, 521; *Indianapolis & St. Joseph R. Co.* v. *Horst*, 93 U. S. 291, 301; *Kerr* v. *Clampitt*, 95 U. S. 188; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474.

Finally, the Board argues that the credibility of Guy, Marx and Freeman had already been subjected to test by cross-examination (Board's brief, p. 52); hence, it is claimed that the remand is unnecessary for the purpose of further testing the credibility of these witnesses. But at the time of the cross-examination, although one of the crimes had already been committed, others had not as yet been committed, and in any event, respondent did not then know that these persons were implicated in these acts of terrorism and could not impeach them then by proof of conviction of felonies of the most serious character. Since respondent has attained such knowledge, it has not been afforded an opportunity, by further cross-examination of these witnesses and otherwise, to show the complicity of these persons and, indeed, of the Brotherhood itself in these crimes. This was one of the purposes of the remand ordered by the Court of Appeals. The denial of such op-

portunity would constitute a perversion of justice and would permit the Brotherhood to become the beneficiary of its own criminal acts.

II. THE QUESTION WHETHER THE FINDINGS OF THE BOARD ARE SUSTAINED BY SUBSTANTIAL EVIDENCE SHOULD NOT BE DECIDED BY THIS COURT NOW. THE CIRCUIT COURT OF APPEALS DID NOT PASS UPON SAID QUESTION

The lower court [124 Fed. (2) 50, 58], (R. 876), after deciding some of the questions submitted, said:

> "The other issues presented by the parties to this appeal remain undecided."

Three questions remain undecided by the lower court: (1) if there was such bias and prejudice of the trial examiner as amounted to a denial of due process of law, (2) if the findings of the Board are in the form required by law, and (3) if the findings are supported by substantial evidence.

The Board's brief (p. 53) would have this Court decide all questions and remand the case to the Circuit Court of Appeals so that it may do the clerical act of entering the judgment.

III. THE BOARD'S FINDINGS OF INTERFERENCE WITH B-9, WITH SELF-ORGANIZATION, AND OF DOMINATION, INTERFERENCE WITH, AND SUPPORT OF THE ASSOCIATION, ARE NOT SUSTAINED BY SUBSTANTIAL EVIDENCE

The finding of the Board that the formation of said Association was dominated and interfered with by the Company was not based upon direct evidence, but on inferences drawn from petty and immaterial circumstances.

There was no finding made by the Board, and there was no evidence, that the Company in any way suggested the

formation of the Association; that it suggested membership therein to any employee; that it secured any advantage from its formation; that any employee who joined or organized the Association was in any way favored or rewarded or that any supervisory employee who joined or aided in the formation of the Association, held out or represented to any fellow employee that in joining or in organizing the Association he was carrying out the wish or the will of the Company; no witness for the Board testified that he believed that the supervisory employees who interested themselves in the formation of the Association represented the Company or was carrying out its will; there was no testimony that the Company knew of any of the acts of the employees in forming the Association or that it in any way adopted or approved of their acts; there was no evidence whatever that the acts and steps in the organization of the Association were known by the Company; there was no evidence that the Company knew of or ratified any of the conversations among the employees with respect to the formation of the Association or any other union; there was no evidence that the Company in any way discouraged membership in any competing union; that it discriminated against anyone because he failed to join the Association or joined some other union; there was no evidence that the Company gave any financial assistance to the Association or that it permitted the use of any of its property by the Association or that any of its officers attended any meeting of the Association or knew of the holding of any such meeting; there was no evidence of demotion, discharge or reduction of pay or even a threat of discharge or demotion; there was no fear of reprisal, and witnesses called by the Board and at the instigation of the Boyle Union, stated that they felt free to do as they wanted to do about joining unions (R. 191, 261, 263).

The Board based its finding wholly upon the fact that some foremen and supervisory employees assisted in the formation of the Association and were members thereof. The constitution of the Association permitted foremen and supervisory employees to be members (R. 797-809) and foremen joined the Association only after an opinion was given by an attorney for the Association that they had such right under the Act (R. 531, 569, 581). The record presents a case where foremen in joining the Association were serving the interests of themselves and of their fellow employees.

The Indiana & Michigan Electric Company employed approximately 1,000 employees in the year 1937 (R. 620). It had had no labor trouble or disputes whatever. There is no evidence that the Company was in any way hostile to the employees being members in any labor organization. Guy and Marks testified that the Company's General Manager, English, and its Secretary, Calvert, had stated that the Company's officers could not interfere with the labor connection of employees (R. 186, 189). Guy and Marks solicited employees for members in the Brotherhood even during working hours without any interference from the Company (R. 187, 190). The record is full of evidence that the executives and superintendents of the Company time and again advised that the Company could not and would not interfere with the union affiliations of the employees (R. 187, 189, 261, 263, 278, 364, 373, 441, 608, 610, 623, 624).

The Board's brief (p. 12) speaks of "The Company's opposition to outside unions." There was no such opposition. The brief refers to pages 189 to 190 of the record to sustain the statement. There is no evidence whatsoever upon said pages of the record to permit the drawing of even an inference of opposition. This is followed by the statement that when the A. F. of L. affiliate undertook the organization of the Company's employees that it

"promptly evidenced its opposition by subjecting the first Brotherhood meeting to surveillance." The brief sets out only a part of the facts. It omits entirely those which explain the presence of Foremen Livelsberger and Carlton at the meeting of the A. F. of L. Union.

The A. F. of L. Union held a meeting for organization purposes in April, 1937. There was a general invitation to all employees to attend (R. 481, 576). This included all foremen and supervisory employees. Earl Livelsberger and Glen Carlton drove out to the place of meeting, but did not go into the meeting but sat outside in an automobile. Guy, the Union's business manager, came out of the meeting and again invited Livelsberger and Carlton into the meeting (R. 181; 188, 278, 481, 578); others connected with the Union also invited them (R. 276), but they did not go in. Livelsberger testified that he went there because he was invited, that he did not go to spy on anyone, that he went out to see whether those with whom he had associated with for years attended and he did not see anyone he cared about (R. 181). Carlton said he went out for his own benefit (R. 578). The statement of Livelsberger that there was no one at the meeting that he cared anything about was an entirely rational one. The meeting was attended by only twelve employees (R. 261-2); among those in attendance were Guy, Marks and Freeman, two of whom have been convicted of crime and are in the penitentiary and the third directly assisted in drawing out of the Union's treasury more than $2,000.00 to procure the commission of crimes against the Company's property. It was entirely rational that a decent employee learning that only this few composed of three men of criminal character, would not enter the meeting.

Two other employees present were Albert Otis and Claude F. Buckley. Their evidence is in the record (pp. 303 to 320) and a cursory reading of the same is sufficient

to disclose their total irresponsibility; their evidence gives rise to the inference that these two men who came from Chicago and were members of the Brotherhood since 1935, had been planted in the Company's organization by the Brotherhood. There is no evidence whatever that Livelsberger or Carlton made any report to the Company or any of its employees of this meeting; nor is there any evidence that the Company knew of their presence at the meeting; nor that the Company authorized their conduct or in any way received any benefit from their acts, or acted in any way with reference thereto. There is no evidence that the conduct of these men influenced any employee with reference to his union connections.

The Board's brief (p. 33) says that

> "When one of the employees became aware that Foremen Livelsberger and Carlton were subjecting the Brotherhood meeting to surveillance, his immediate reaction, in order to avoid their displeasure, was to get out of there"

and cites Record 349. This reference is to the testimony of Frank Claeys and to show how unfair this statement of the evidence is, we quote the same:

> "Q. Will you describe what Mr. Carlton was doing?
> A. He was sitting in the car.
> Q. Was he looking at you?
> A. I couldn't say. He was not when I looked at him. He had a newspaper or something.
> Q. What was he doing with the newspaper?
> A. I didn't notice. I wanted to get out of there.
> Q. Did you leave?
> A. I did not.
> Q. Where did you go?
> A. I went inside."

The Board's brief attempts to suggest that the employee was so frightened at the presence of Livelsberger and

Carlton that he left the meeting, whereas the evidence shows conclusively that he left his place on the street by going into the meeting.

Wherever similar facts have been presented to Circuit Courts of Appeals, it has been held that such conduct did not constitute espionage or surveillance.

In *Ohio Power Company* v. *National Labor Relations Board*, 115 Fed. (2) 839 (C. C. A. 6), it was held that the labor activities of a hired detective did not constitute espionage because there was no evidence that the detective made any report to his employer.

In *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 Fed. (2) 652 (C. C. A. 9), it was said:

> "Though surveillance may constitute an unfair labor practice, it is not such unless it interferes with, restrains or coerces respondent's employees in the exercise of the rights guaranteed in Sec. 7 [Section 8 (1)], or dominates or interferes with a labor organization as prohibited by Sec. 8 (2)."

In *National Labor Relations Board* v. *Botany Worsted Mills*, 106 Fed. (2) 263, 268 (C. C. A. 3), an employee overheard a conversation in respect to union organization and reported the same to his employer who acted thereon. It was held that this isolated report did not make the employer guilty of spying.

A case almost identical in its facts with the case at bar is *National Labor Relations Board* v. *Mathieson A. Works*, 114 Fed. (2) 796, 801 (C. C. A. 4), where one Taylor, a foreman, had stopped his automobile opposite the place of the union meeting. Some union members coming out of the meeting saw him and testified he was writing in a book. The Court said this evidence would not permit the inference that he was spying; that "If there had been any desire of the respondent or its supervisory employees to spy on the meeting, they would hardly have placed a foreman opposite the meeting hall for this purpose."

But it ought to be sufficient to say that Livelsberger and Carlton were eligible to membership in the union, they were invited to the meeting by union representatives during the day, and when they arrived at the meeting place they were twice invited to attend. Obviously, the conduct of these foremen, consequent upon such invitations, was not espionage or an unfair labor practice.

In *the initiation and organization of the Association* the Board next ascribes (Br. p. 14) to Line Foreman LaVelle the important matter of determining an anti-union policy for the Company; the Board desires to create such anti-union policy in the Company so that the principles of *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, may have some application; the extremity to which the Board has gone is well illustrated by the far-fetched inference drawn from the evidence of LaVelle. The Board took evidence for days, a record of more than 2,200 pages exclusive of exhibits, and from among more than 1,000 employees. LaVelle, a line foreman over a crew of two men (R. 500), directing merely the manual operations of repairing lines, is the only employee making any statement from which the Board draws an inference of anti-union policy upon the part of the Company. But in his statement that the "A. F. of L. and the C. I. O. got so strong that they were going to come in and take our playhouse away from us" (R. 498), there was not even the expression of an anti-union prejudice on the part of the witness, and certainly he was not attempting to express an attitude or policy of the Company.

It is natural of course that among 1,000 employees there might be some who joined the Association to keep other unions out, but every member who testified concerning hoped-for benefits from the Association spoke of wages, grievances and other matters affecting their working conditions. Taylor Edgell testified (R. 208) the Association

was formed to handle grievances; Holmes said (R. 223) it was a channel to clear grievances; and (R. 253) in order to bargain collectively; Lambert (R. 271) read the Wagner Act to express its purpose; Collins testified (R. 282) that the Wagner Act was discussed to bring out the right to form an association for sole bargaining rights of wages, hours and working conditions; Henderson said (R. 393) that by forming an organization linemen would get more money; and (R. 405) there was a feeling among some of the employees that they should get more money; Harter (R. 514) inquired of the method of Bell Telephone employees in handling grievances.

No reference was made by the Board to these statements of the purposes of the Association nor to the specific statement of purposes in the by-laws (R. 797-8).

But as was held by this Court in *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, LaVelle did not occupy such a position that his statements are evidence of the Company's policy.

There were approximately 700 members of the Association who did not testify, and this most improper finding based upon the rambling opinion of one employee is inserted in the "finding" in order to create the guess and inference that the Association was not created to foster the purposes of the Wagner Act. The Board would destroy the organizing efforts of all these employees upon the statement of this most lowly supervisory employee.

Neither reason nor evidence sustains the Board's finding that the acts of Harter are attributable to the Company. And neither does the evidence justify the drawing of an inference that the statement of LaVelle that the A. F. of L. and C. I. O. were not needed by the employees was an expression of the policy of the Company. To make such inference there would have to be some evidence that these foremen, who had no authority except to direct the

manual operations of two or three linemen, were not serving themselves but were acting by authority of their employer, or that their employer got some advantage from or acted upon their conduct. There is no such evidence.

But an examination of Harter's talk (R. 143) shows nothing except the membership of the small crew had attended a meeting; whose meeting it was or what was said or done at the meeting, does not appear; Harter did not even find out who was at the meeting (R. 522). There is nothing in the record to show that the questioning by him caused any employee to adopt or refrain from adopting any particular conduct with reference to labor relations. Even if his talk were "attributable" to the Company, it did not constitute an unfair labor practice. As was said in *Quaker State Oil Refining Corporation* v. *National Labor Relations Board*, 119 Fed. (2) 630 (C. C. A. 3), isolated talks of *superintendents* with men concerning the advisability of a proposed union, "which had not the slightest effect in preventing or discouraging membership," would not support a finding of domination. There is no coercion or interference within the meaning of the Act unless there is pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization."

In *National Labor Relations Board* v. *Empire Furniture Co.*, 107 Fed. (2) 92 (C. C. A. 6), a foreman had referred to the C. I. O. union as a bunch of communists, and by many other extremely derogatory references. The Court said that there was no evidence that these observations reflected the view of the management.

In *National Labor Relations Board* v. *Botany Worsted Mills*, 106 Fed. (2) 263, 268 (C. C. A. 3), a foreman acting of his accord not only indulged in "persistent questioning" as to union membership but reported the same to his employer. It was held that this was not substantial evidence of an unfair labor practice against the employer.

In *National Labor Relations Board* v. *Whittier Mills Co.*, 111 Fed. (2) 474, 479 (C. C. A. 3), a foreman said: "I would not belong to that old union, it causes lots of trouble . . . at the time of a strike, they lost lots of jobs, and it caused them to be moved out." Another referred to it as a "damned union." The Court said:

> "Isolated speeches like these made by underlings, though having some authority, in casual conversation with fellow employees, which are not authorized or encouraged or even known to the management, ought not too quickly be imputed to the employer as his breaches of the law. When not made in the exercise of authority but in personal conversation, they do not appear to be the sentiments of the employer nor his acts, and to make them such the circumstances ought to show some encouragement or ratification or such repetition as to justify the inference of a policy which they express."

The same rule was applied in *National Labor Relations Board* v. *Mathieson A. Works*, 114 Fed. (2) 796, 802 (C. C. A. 4).

The Board's brief abounds in high-sounding titles. But tities are not evidence. *Cupples Co.* v. *National Labor Relations Board*, 106 Fed. (2) 100 (C. C. A. 8). The burden of proof was upon the Board to prove who were members and that they occupied such a position and had such power that they represented management. *National Labor Relations Board* v. *Union Mfg. Co.*, 124 Fed. (2) 332 (C. C. A. 5). As to most of them there is a total lack of evidence as to their position and relation.

We cannot, without making this brief too long, set forth the evidence or lack of evidence as to each of the employees named. But, for example:

George S. Holmes, President of the Association, was not a supervisory employee at all; the evidence is undisputed

that he did not have a single employee under him (R. 219); he had no authority to give or require compliance with any order given by him (R. 250); he had no power to enforce complaints. His duties were to visit line crews, observe whether they were taking precaution to keep down accidents and to hold safety meetings (R. 249-250). The selection of Holmes by the employees who became members was a most natural one; one of the Board's witnesses who was a member of the Brotherhood said that "Holmes was 100% respected by the employees of the Company" (R. 276).

F. M. Henderson (R. 155) is given the high-sounding title of "Transmission or Design Engineer" in Company's "Hierarchy." The evidence is that he stakes out right of way for the construction of rural lines—such a job as a high school boy could do (R. 458). He makes no decisions or determinations for the Company; he does not order or purchase material, and he has seven persons under him doing right of way work (R. 388-391). In joining the Association he acted upon his own initiative (R. 399); he would not sign a card until he received the attorney's opinion that he was eligible (R. 531). Henderson's only activities consisted in lending the use of his home for one of the meetings, attending the organization meeting, signing the request to the Company that it recognize the Association, and presiding at one division meeting; he did not engage in any activity after July 1, 1937. He was never an officer or committeeman.

Frank Miles (R. 156) made plans and drawings for distribution lines in South Bend; he made no decisions (R. 536-537), he aided in getting the membership cards printed, and nominated Holmes at the organization meeting (R. 541). He may have solicited two persons to sign cards (R. 543); it does not appear that they did sign. He held no office or position.

Glen Carlton (R. 157) was a line foreman; he asked the attorney whether there was any reason why he could not be a member, and was assured that he could be (R. 569-581). He solicited two or three employees to become members (R. 578). He handed out from 24 to 30 cards (R. 569); he had no authority over crews or grievances (R. 586); he joined of his own volition, no one connected with the management made any suggestion to him to join (R. 518); he never occupied any office (R. 581) and there is no evidence of any activity on his part one month after the Association had been organized (R. 572). He handled no grievances (R. 585, 587), and never discriminated against anyone on account of union connections (R. 579).

Taylor Edgell (R. 158) was a line foreman in the Benton Harbor Division. There were five other line foremen in that division, all of equal rank (R. 192). He was active in the Association both in its organization and as an officer; in joining he acted on his own initiative and was not influenced by any word from the Company (R. 196, 214). There was never any complaint of favoritism or discrimination on account of union connections made against him; he had no authority to hire or fire (R. 211).

We next present the record references as to the 37 named in the Board's Brief at pages 16-17. The names are arranged in alphabetical order.

1. Ed. G. Brewer is said to be a member and a foreman (R. 159). There is no evidence that he became a member. Board's Ex. No. 12 does not show that he even signed an application card. One Ed. J. Brewer, *a street lighting man*, signed a card (R. 743).

2. R. J. Brown is found to be an assistant service superintendent, to have joined, and "otherwise assisted the Association" (R. 161). There is no evidence as to his authority. There is no evidence whatever from which even a guess could be made that he "otherwise assisted the Association."

3. E. Brubaker is said to have joined the Association early in its existence and to be a "general line foreman" (R. 158). But see Ex. No. 12, p. 743. *His name is not there shown.* It does show E. L. Brubaker, a *"Meter Tester,"* as having signed a card. There is no evidence of identity of these two names. Company's Ex. No. 17 shows that E. Brubaker *does not have a single employee under him,* and neither is there any evidence of his exercising any authority or control over any other employee.

4. Robert Chambers is referred to (R. 159) as a member and a foreman. Robert Chambers, a transmission lineman, signed a card (R. 745). The only evidence as to his position or authority is that "Chambers" has in his crew himself and "two or three men, besides himself" (R. 457).

5. R. E. Denman is referred to (R. 159) as a "meter superintendent." Company's Ex. No. 17 shows that *he does not have a single employee under him.* Mr. DeQuine is the only one who testified concerning his position and certainly his testimony (R. 468-469) is not sufficient to sustain a finding that he is a foreman, a superintendent, or a supervisory employee. The most that can be claimed from his testimony is that he *imagined* Denman might have two or three testers under him, after testifying he didn't know (R. 469).

6. Russell T. Harter (R. 158) was active in the pre-organization meeting of 26 employees at Lavelle's home. He asked one employee to become a member (R. 350) who afterwards became a member of the Brotherhood (R. 348). He engaged in no other activity (R. 530). He was at the head of a line crew of four men directing their work (R. 512). He had no other authority.

7. Claude Hildebrand (R. 158) attended the organization meeting at the school house. He told another employee about the meeting (R. 262). This employee joined the Brotherhood (R. 262); other than this he engaged in

no activity whatever. He was a line foreman and possessed no other authority.

8. R. L. Hoblitzel (R. 159) was not a member of the Association but was a member of the Brotherhood (R. 327). He was very active on behalf of the Brotherhood, but was in no way active on behalf of the Association.

9. Deo Howe is referred to as a foreman (R. 159). Company's Ex. 17 does not show that he has any employee under him. There is nothing in evidence showing Deo Howe was a supervisory employee.

10. Ray Humberger is referred to as a member and a foreman (R. 159). The card states that he is a "shop foreman." There is absolutely no evidence of his position or authority.

11. So of O. E. Jefferson, referred to in the footnote of the Board's findings as a member and a foreman (R. 158).

12. E. L. Johnson. There is no evidence in the record about his position or relation to the Company except in Board's Ex. No. 12 (R. 760) he is shown as a "line foreman." There is no evidence that he was a member of the Association or that he had any authority whatsoever.

13. C. E. Knepp. There is no evidence of his being a member of the Association nor of his position or authority. The only place in which he is referred to is in the Board's Ex. No. 12 (R. 762) where he is designated as "Chief Distribution Clerk."

14. E. P. Kreimer is said to be a member and to be an electrical engineer in charge of records (R. 156). The only evidence as to membership as in the case of a number of others in this list is that he signed a membership card (R. 762).

15. Ray Landon is referred to as a member and a foreman (R. 159). The statement on the card that he is a "line foreman" is not sufficient evidence to sustain a find-

ing that he is a supervisory employee. The record contains no evidence as to his authority or that he has any employee under him.

16. William LaVelle (R. 488) was a foreman of the service rig. He had two employees under him (R. 500). He invited a group of 26 to his home for the first organization meeting of the Association (R. 491). The record does not show that he solicited members, and after the first meeting that he engaged in any activity.

17. Ross Lillard (R. 158) was at the head of the tree-trimming crew that traveled from place to place to do its work; one of Company's rules was that the employees should appear for work at the place where the truck was left the preceding evening (R. 552). One morning Garner, one of the crew, did not appear, and Peach, the driver of the truck, and another member, Durfey, got into a quarrel because Peach would not drive by the house where Garner was stopping (R. 553-555). All these men were called before Superintendent DeQuine to explain their conduct (R. 436-441). Peach was a member of the Association. DeQuine criticized Peach and disciplined him more than he did Durfey who was a member of the Brotherhood (R. 439). Lillard had nothing to do with this act of discipline. The findings state he attempted to collect dues to the Association; but there is no evidence that he urged any employee to join or pay dues. As a matter of fact, practically all the members of his crew, Ernst (R. 329), Durfey (R. 336), Seeley (R. 341), Kidder (R. 343) joined the Brotherhood.

18. Earl Livelsberger was not a member of the Association (R. 480). The Board's brief (p. 22) states that he "furnished *at least* one employee with an Association membership card," and refers to the findings (R. 148). The findings (R. 157) state a half-truth.

The evidence of Livelsberger is as follows: "Hoblitzel met me in the hallway . . . and asked me if I would get

him a card. . . . I got one and put it in an envelope and put it on the desk where he was talking to me, I did not ask him to sign it. I did not hand out cards to any other person" (R. 482).

Hoblitzel, who was a member of the Brotherhood (R. 182), and was called by the Board, was an adverse witness to Company. He testified (R. 278): "Afterwards I talked with Livelsberger. He was a friend of mine for years, and he refused to advise me one way or the other; I told Mr. Livelsberger that I wouldn't join the Association only through him; if he wanted me to join it, to get me a card and I would sign it; that evening there was a card in the mail basket."

19. Ben Lossee is referred to as a member and a foreman (R. 159). As to his membership in the Association and as to his being a supervisory employee, the Board points to no other evidence than that he signed a membership card which contained the statement "Foreman line" (R. 764).

20. C. E. Masten (R. 765) was a distribution foreman. There is no evidence in the record as to his authority or that he was superior to anyone. He engaged in no union activities whatsoever, except he spoke to one employee about the Association (R. 303). This employee joined the Brotherhood (R. 304).

21. Virgil McClure. The findings refer to him as having authority to employ persons (R. 162) but he was not a member of the Association. He testified he signed a card, but never became a member (R. 362).

22. J. H. Mortimore. He is not referred to in the record at any place whatsoever except in the Board's Exhibit No. 12 (R. 768) where he is referred to as "supervisor." There is no evidence as to his membership, authority or activity.

23. M. E. Mowery is called a foreman (R. 159). To establish that he was a member of the Association and was an employee with supervisory authority the Board relies entirely upon the fact that Board's Ex. No. 12 shows that he signed an application card which contains the words "Line foreman" (R. 768). One M. Mowery is shown on Resp. Ex. No. 17 under the head of "foremen," but there is no evidence that he has anyone under him, or that he has the authority of a supervisory employee.

24. Charles Myers is another who is referred to as a member and a foreman (R. 159). The fact that he signed a card applying for membership which stated that he was a "line foreman" (R. 769) is the only fact pointed to by the Board as to both his membership or his position. The record contains not a word of evidence as to his authority or that he has control or supervision over any other employee.

25. C. F. Rayhorn is referred to in said footnote as a foreman (R. 159). Cfre. Exhibit No. 12 (R. 772) and Company's Ex. No. 17.

26. Fred Rikert is referred to as a foreman (R. 159). DeQuine (R. 456) states Rikert is a crew foreman of a crew from four to eight. This does not make him a supervisory employee identified with management.

27. O. E. Smith is mentioned as a foreman (R. 159). Board's Exhibit No. 12 does not even show that he signed an application card. If he had signed one his name would appear in the alphabetical order on page 777 of the record. And there is not a word of evidence that he was even an employee.

28. Albert Snyder was a member of the Brotherhood (R. 277). The record discloses no activity whatsoever on behalf of either the Brotherhood or the Association.

29. John Stoudt is referred to (R. 156) as "district engineer." There is no evidence as to any activity nor as

to his authority except that he has supervision over a Mr. Wright (R. 465).

30. Donovan D. Strock (R. 168) talked to other members of his crew about the formation of the Association (R. 413). He gave a card to Hulwick who afterwards became a member of the Brotherhood (R. 320). As evidence that Hulwick was not under any compulsion from his foreman, Hulwick subsequently solicited Strock to become a member of the Brotherhood (R. 324). He lived and worked in Butler (R. 412). He ceased being head of the Butler group after a year (R. 235). He had no authority except to direct the manual work of his little crew. The undisputed evidence with reference to Strock shows the complete freedom of choice which the employees enjoyed in selecting their labor alliance. Strock solicited a lineman, Hulwick, under him to become a member of the Association (R. 321); Hulwick later became a member of the Brotherhood (R. 320) he and Marks solicited Strock to join the Brotherhood (R. 321); Hulwick frequently came upon the job so drunk that he was unfit for work, but Strock never recommended his being discharged or disciplined (R. 415-417).

31. George Thibideau is stated to be a foreman (R. 159). The only reference to him in the entire record is that he signed a membership application which states that he is a "boiler room foreman" (R. 780). There is a total absence of a showing that he is a member, of any activity in the Association, or that he has anyone under him or any authority of any kind.

32. Emmett Thomas is said to be a district engineer (R. 156). Company Ex. No. 17 does not show that he has supervisibn over anyone, and Mr. DeQuine's testimony merely shows that E. Thomas is under Diedrich (R. 453). Other than this the record is entirely silent as to his membership, his activity or authority.

33. Henry Thornton is called a foreman (R. 159). The only evidence of his membership is his application card (R. 780). There is no evidence of the number under him or of his authority or activities.

34. John Webb is stated to be a chief inspector of the transmission and distribution department (R. 161); the Board asserts he was a member and that he *otherwise assisted* the Association (R. 161). He signed an application card (R. 782). The record does not contain any evidence of any activity on his part, or of any assistance whatever given by him to the Association.

35. M. Wittmack is referred to as a foreman (R. 158). There is no evidence that he became a member or that he even signed an application card. One H. Wittmack signed a card (R. 784). But in any event, there is no evidence that any person named Wittmack was in any way active or that he had any employee under him or that he was in fact a supervisor.

36. Ward Wright is referred to as an "Engineer" (R. 156). In the entire record there is not a word of evidence that he is superior to anyone. Ward Wright is not referred to in the evidence. W. Wright is referred to only once (R. 465), as being under a Mr. Stout. There is no evidence of his supervising anyone or of being active or giving assistance to the Association.

37. Milton C. Zumpe (R. 157) was not a member of the Association. He testified that while he signed a card, he never became a member (R. 368).

The supervisory character of many of the employees is created in the findings by the use of a profusion of titles. In most instances there is a total lack of evidence that many of them were supervisory employees. There is a total lack of evidence that many were members of the Association. The Board assumes that all persons whose names appear on Board's Exhibit 12 were members. This

Exhibit is a copy of application cards prepared by a stenographer on August 21, 1937 (R. 226, 670, 679). It contained 794 names (R. 738-785). *That they were in fact members was not supported by the testimony of any witness.*

The by-laws of the Association require (R. 799-800) an applicant to do three things in order to become a member: (a) sign a standard application, (b) pay an initiation fee, and (c) receive approval by a Group Committee.

The Board accepted the fact over the challenge of the Company and in the face of evidence that Board's Exhibit No. 12 (R. 737-785) was incorrect. The last witness called was Ray M. Collins, who testified that he checked the employees who signed cards and paid dues, and that there were 667 members only. Board's Exhibit No. 12 contained 794 names, obviously the list contained 127 names of persons who were not members of the Association.

The findings say that supervisory employees "actively engaged in the collection of dues for the Association" (R. 154); and that foremen participated in a membership campaign (R. 148). There is no evidence that the Company knew of the activities of any of them. Whatever was done both in the collection of dues and solicitation were their own acts.

The record is conclusive that the employees were free to exercise their own judgment in union matters. The Board's witnesses who were members of the Brotherhood testified that they did not feel any restraint about joining a union (R. 265). They either joined or continued to be members of the Brotherhood after the organization of the Association. *Indeed, some withdrew from the Association and joined the Brotherhood.* See evidence of Shields, Edwards; Freeman, Hoblitzel, Hulwick, Elkins, Durfey, Seeley (R. 261, 263-5, 276, 277-8, 320-1, 326, 336, 341). There was not a single employee who said that he felt obliged to join or refrain from joining any union.

Edgell, Lillard, Daniels, Miller, Thornton, Strock and C. E. Knepp are named as having collected dues (R. 154). There is no evidence that Edgell collected dues; he only received money from one who did collect. Lillard asked Ernst (R. 332), Durfey (R. 337), Seeley (R. 342) and Kidder (R. 345) to pay their dues—all refused to pay and afterwards joined the Brotherhood (R. 329, 336, 341, 343) and none was in any way discriminated against. Daniels and Miller asked Shields to pay his dues; he refused to pay and joined the Brotherhood (R. 261). Miller asked Claeys to collect dues; Claeys quit collecting and signed a card for membership in the Brotherhood (R. 348). There is no evidence that "Thornton" was a foreman, that he was a member of the Association, or that he collected dues. Only one man, Hulwick, paid dues to Strock (R. 323); Hulwick afterwards joined the Brotherhood and solicited Strock to become a member (R. 320, 324), and although Hulwick at times was unable to work because of drunkenness, he was not discharged or discriminated against (R. 416). C. E. Knepp acted as treasurer of a division; there is no evidence that he collected dues, or that he was anything but a clerk at the time he acted as treasurer. As was said in *National Labor Relations Board* v. *Whittier Mills Co.*, 111 Fed. (2) 474, 479 (C. C. A. 5), the employees did not seem to have been impressed by the acts or statements of the foremen.

Miles, Henderson, Edgell, Strock, Masten, Hildebrand, Miller, Carlton, Harter, LaVelle, Clark and Daniels are named as having participated in the membership campaign (R. 148). Miles asked two to sign (R. 543); there is no evidence that they signed. There is no evidence that Henderson solicited anyone. Edgell solicited "some" (R. 211). Strock solicited Hulwick who afterwards joined the Brotherhood (R. 320). Masten asked Otis and Buckley to sign cards (R. 850); both refused to be members and continued to be members of the Brotherhood (R. 304-320). Hilde-

brand merely spoke to Hoblitzel about there being a meeting (R. 262); Hoblitzel joined the Brotherhood (R. 182). Miller received Freeman's card; Freeman later joined the Brotherhood (R. 276). Carlton says he solicited one or two (R. 578); Shields, Elkins, Freeman and Havlin testified that Carlton solicited them; all of them joined the Brotherhood (R. 260, 276, 326, 355). Harter solicited Claeys, who thereafter signed a Brotherhood card (R. 348). There is no evidence that LaVelle or Clark solicited anyone. Daniels solicited Havlin, who later joined the Brotherhood (R. 355). The evidence shows that *twelve* out of *seven hundred* were solicited by foremen. The freedom with which employees either joined the Brotherhood or withdrew from the Association shows that there is no justification in the Board's Brief (p. 27) that the employees had "just cause to believe" that the sponsors of a labor organization "were acting for and on behalf of the management." There is not a fact in the record that would permit the drawing of such a legal inference.

Thus, of the foremen who were members, and who were characterized by the Board as "outstandingly active," we find only four, who were more or less active in the organization or administration of its affairs, viz: Henderson, Miles, Carlton, and Edgell. Out of a union membership of from 650 to 750 members at most, there were four foremen who were active. The Trial Examiner named only eleven in his Intermediate Report as being active. He was able to find only 29 who became Association members; by the use of hearsay and unverified evidence, the Board ballooned the figure to forty-six.

These foremen had a right under the by-laws of the Association to join it; *they had a right under the by-laws of Brotherhood to join it; in fact, three of the fourteen members of the Brotherhood were foremen* (R. 94, Ex. 4). *Foremen joined both unions.* These foremen were also author-

ized by the Act to form their own union or to join another. *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 112 Fed. (2) 545, 551 (C. C. A. 5).

Not only was each permitted by the by-laws and by the Act to join, but in the greatest of good faith they counseled with the Association's attorney as to their right of membership. They were assured that they had the right (R. 509, 531, 540, 569, 710,

The management frequently gave direction to department heads that the employees must have complete freedom of action in their union affiliation (R. 187, 190, 261, 263, 278, 363, 373, 441, 608, 623). *This was done with respect to both unions.*

The case of the Board that the acts of supervisory employees were the acts of the Company is based upon incidents of the most petty and trivial character; the Board in its brief (p. 32) stresses the importance of "petty discriminations" in fastening domination upon an employer. But the Board has not presented even a single "petty discrimination" against any employee.

There is evidence that there were a very few foremen members of the Association; they had the legal right to be members. It is well said of them in *National Labor Relations Board* v. *Arma Corporation*, 122 Fed. (2) 153, 156, that:

> "If such employees were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of the most competent men in the appropriate bargaining group would be eliminated."

The Board's brief (p. 8) says that supervisors contemporaneously organized the Association for the purpose of "forestalling outside organizations," and again on page 34 that a large number of foremen banded together "in a quick campaign for the *admitted* purpose of excluding other

organizations." It also says that the employees "were forcibly and concretely impressed concerning which organization their immediate superiors expected them to join."

There is not the slightest justification existing in the record for these statements. The only evidence in the record that would permit the inference that the Association was formed to keep other unions out, was that of LaVelle that the other unions were "going to take our little playhouse away from us" (R. 498). There is no evidence of any force used, or of the slightest threat of even a petty discrimination against any employee if he did not join the Association, or if he joined some other union.

The Association was formed between May 16th and May 20th, and some who joined may have been inspired to do so to keep out some other union, but the organization of 700 employees should not be impeached or destroyed because of that intent on the part of a few. Even if the majority organized it for that purpose, that would not create domination on the part of the employer. It can easily be conceived that certain of the employees were most disturbed at the steps of Boyle, Marks, Guy and Freeman to force upon them their organization. See *Boyle* v. *United States*, 259 Fed. 803, 808, and *Marks* v. *State of Indiana*, 40 N. E. (2) 108. These were men of such criminal character that they would resort to the destruction of both life and property to fasten their graft and racket upon decent and law abiding workers, who must have had a most earnest purpose to escape their control.

The brief next refers to the finding of the Board (p. 19) that the Company's "purpose in granting the increase was to prevent the Association from losing members."

The finding (R. 153) states: that in a conference with the Association's Committee, Mr. Calvert declined to discuss a wage increase until Mr. English, Company's General Manager, could be present, and that Holmes (the

Association's president) then pointed out that "if negotiations are allowed to drag indeterminately, it will contribute to more dissatisfaction arising among the men"; that Collins remarked "It might be surprising to you to know that a lot of men are much more favorable to other organizations. If no action is received, the Association will be a flop." That, *without further discussion*, the Company offered the Association a wage increase of 5 cents per hour effective November 1. (Our italics.)

This is accepted by the Board as unlawful support of the Association by the Company; and the Board's brief (pp. 19-20) says that "this was a permissible finding based upon a reasonable inference."

The Board in making this finding intentionally makes it appear, contrary to the evidence, that all of the above facts happened simultaneously.

The quoted statements are taken from the Company's minutes of a meeting held on October 1st (R. 833-846, Exhibit 24). It is hardly reasonable that if the Company were dominating the Association it would put the statement in its minutes. A wage increase had been demanded before this. There had been many talks about an increase (R. 208). Not until October 18th did the Company offer an increase (R. 847, Exhibit 26). The offer was submitted to the employees in each of the four divisions and was approved by a majority in each; and not until October 29 did the Association formally accept the offer (R. 847). The evidence proves conclusively that there was no hurried conclusion to the bargaining as the Board implies in its finding. It was not hurriedly granted and it was not hurriedly accepted. This collective bargaining was entirely legitimate. The Company had already recognized the Association as a bargaining agent (R. 832, Exhibit 23) and was required to recognize it since it had a majority of Company's employees as members. It was Company's duty

under the law to bargain with the Association and it was certainly the Company's duty to refrain from any act that would impair the Association's bargaining power, cause it to lose members, or destroy it. If the Company had refused to grant a raise in wages with the purpose of causing the Association to lose members, this would have been an unfair labor practice.

All the cases hold that the showing of a preference of an employer as between labor organizations or acts of cooperation between an employer and a labor organization representing a majority do not constitute support or unlawful interference. *Diamond T. Motor Car Co.* v. *National Labor Relations Board* (C. C. A. 7), 119 Fed. (2) 978; *Jefferson Electric Co.* v. *National Labor Relations Board*, 102 Fed. (2) 949, 956 (C. C. A. 7).

The Board's brief (p. 20) cites ten cases in which the courts have upheld the right of the Board to draw the inference of domination because of a wage increase, but an examination of all of these cases shows that there existed in each other facts which most conclusively showed control and domination by the employer. There existed a set of facts from which the inference of domination could reasonably be drawn. In one, the organization meetings were called by the company's personnel manager; in another the company officials questioned employees concerning their union membership and discharged 140 union employees; in another the president told the employees "If you boys won't set up a company union, I will—in fact I have already set it up" and immediately granted to the employees, without any bargaining, an increase in wages; in another the company's vice president during an organization campaign by a union, first stated that his company was losing money, then as the campaign proceeded, he granted an increase in wages without any demand; in another the general manager called in five or six employees

who had joined the union, told them he would close his plant if he could not run his business as he desired and on the same day he offered all employees an increase in wages—this was done without any bargaining or demand; in another the manager informed the employees he would not permit any organization whatever to dictate his personal affairs and within seven days thereafter he granted a wage increase without any demand or request.

In the present case the wage increase was granted after bargaining for several months and during several meetings; the Company's officers had in every way kept their hands off of union affairs and no inference whatever can be drawn from the Company's act in doing what the act required it to do, viz: to bargain with the employees.

IV. THE TRIAL EXAMINER CONDUCTED THE HEARING IN SUCH A MANNER THAT THE COMPANY WAS DENIED DUE PROCESS OF LAW

Since the Board asks the Court to review the entire record the Company presents the above stated matter for the consideration of the Court.

As was said in *Inland Steel Co.* v. *National Labor Relations Board*, 109 Fed. (2) 9, 21 (C. C. A. 7), the Act requires "a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties *equal consideration.*" (Italics ours.)

Let the record speak whether the Company was accorded such a hearing.

The complaint was filed November 12, 1938, and the hearing was set for November 28, 1938. The respondent promptly filed a motion (R. 36) to extend the time for the hearing, the principal ground of which was that respondent's attorney, Orlo R. Deahl, was sick and that he alone was familiar with the case. This motion was renewed before the Trial Examiner and was immediately denied (R.

176). The hearing proceeded until November 30th when Mr. Deahl became so ill that he had to retire from the case, and Company was represented from then on to the end of December 9th by Mr. Seebirt and Mr. Thornburg, both of whom were unfamiliar with the case.

Although the complaint wholly failed to comply with the rules of the Board (page 2 of Rules of April 27, 1936) which required it to contain "a clear and concise statement of facts, constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence," the Company's efforts to have it comply were unavailing (R. 173-6). There was no reference to a charge of espionage or surveillance in the complaint (such as found by the Trial Examiner and the Board); there was no charge giving the Company notice that the Board intended to establish a case of domination of the Association by making the Company responsible for the acts of certain of its supervisory employees and there was no charge of discriminatory transfer of Earl Freeman.

The Court said in *National Labor Relations Board* v. *Piqua Munising W. Prod. Co.*, 109 Fed. (2) 552, 558 (C. C. A. 6), nothing can be so

> "dangerous in its implications as is the approval of an order of the Board based upon a finding of an unfair labor practice which was never charged and as to which the employ - could not have had the opportunity provided for in Section 10 (b) to file answer and appear in person or otherwise and give testimony at the time and place fixed in the complaint."

The Trial Examiner had no patience with the Company's effort to require the complaint to conform to the Board's rules. (See his argument, R. 173-176.) He summarily overruled the motion to make the complaint more certain.

The Board's attorney consumed 91 pages of the record in examining witnesses concerning the activities of some of the Company's supervisory employees in the organization and administration of the Association. But the Trial Examiner far outstripped the Board's attorney; his record is 149 pages (R. 125). It was the Trial Examiner who required the preparation of a chart of employees (Rec. Exhibit 17, 626). He required the placing of all the membership cards in the record, took them with him and made findings and conclusions therefrom, although no witness under oath had testified as to the accuracy or truth of these cards. In fact, two witnesses [Zumpe (R. 368) and McClure (R. 361-2)] whose cards were in the number testified under oath that they never became members, nevertheless he found them to be members. The Examiner pretended that he wanted the cards for one purpose, viz: to count members, but instead he made conclusions therefrom as to the rank and supervisory character of the employees. This was done in violation of plain rules of evidence. See *National Labor Relations Board* v. *Lightner Pub. Corp.*, 113 Fed. (2) 621, 625 (C. C. A. 7).

He interrogated one of the Company's superintendents as to his conversations "at home or at the plant with your friends and acquaintances or business associates about this labor situation" (R. 127). He questioned another of the Company's superintendents about the discharge of employees in 1928 and 1929, five years before the Act became law (R. 442-6). He interrogated Hoblitzel, one of the Board's witnesses, about a discharge five years before the Act was passed (R. 126-7). He ridiculed the purposes of the Association by asking respondent's Secretary, Mr. Calvert: "Didn't somebody say the purpose of the Association was to do unto others as you would have them do unto you" (R. 101).

Not only did he engage in this intemperate and unjudicial conduct, but further to demonstrate his preconceptions and distorted labor philosophy that the Golden Rule has no place in the relations of employer and employee, he embodied this remark in his findings (R. 67, Finding 36). He belittled the selection of Collins as a representative of the Association as coming from "washroom talk" (R. 99, Finding 21).

Although there was not the slightest reference in the complaint to any discrimination against Earl Freeman, the Trial Examiner questioned him at great length upon a statement volunteered after his direct and cross-examination, and after he had been excused as a witness; not only did he alone develop Freeman's story but he even made a finding of discrimination against the respondent upon this evidence.

One of the best illustrations of the Trial Examiner's advocacy was his examination of the Company's superintendent DeQuine. After the witness had been cross-examined by the Board's attorney, the Trial Examiner examined him for almost half a day (part of the examination is found in the Record at pages 450 to 476) in which he devoted himself to his theory of establishing domination of the Association through supervisory employees.

Another example of his advocacy was his attempt by leading questions to get witness Clarence E. Daniels to testify that Chambers, Hildebrand, Riker and Miller had attended the organization meeting at LaVelle's home. Notwithstanding that no other witness had testified that any of them were present he questioned the witness to show they were (R. 535).

Certainly when a Trial Examiner undertakes by leading questions to establish facts whose existence has not been suggested by any witness or party, he has gone far

afield of clarifying testimony; he has entirely abandoned his position as a judge, and has become the Board's advocate. A judge's partisanship usually is disclosed, if at all, by seemingly little and unimportant acts and incidents, but here they are revealed in conduct usually found only in an aggressive prosecutor.

We do not question the Examiner's right to interrogate witnesses to clarify testimony, but he should do so as an impartial participant, and not as an advocate endeavoring to establish one side or the other of the controversy before him. And when his participation in the trial shows that he is not impartial, as it clearly appears in this case, then his ability to weigh evidence, accepting that which is trustworthy, and rejecting that which is not, totally disappears; and the judging process no longer functions.

Many of his findings (findings later adopted in their substance by the Board) were unsupported by evidence; the number is so great that it could flow only from a most partial mind. The Trial Examiner labored diligently to avoid making any findings favorable either to the Association or to the Company. Perhaps the most important fact in the case was that at all times the Association had a majority of the employees as its members, but his bias would not permit him to find this conceded fact. He made 90 different findings, but there was only one favorable to the respondent; there was no escape from making this. It related to a discharge of Elkins, who himself testified that his employment was temporary (R. 327). Nevertheless, respondent had to proceed with several witnesses to clear itself of discrimination against Elkins. It is inconceivable that an impartial trier of facts could receive evidence for ten days, involving a transcript of 2,200 pages, make 90 detailed findings, and not be able to find something in favor of the Company.

The Company's exceptions to the Report are found in the Record (pp. 93 to 129). Each statement as to the evi-

dence is supported by page reference to the transcript. A reading discloses that the Trial Examiner was not an impartial participant, but was an advocate endeavoring to establish the Board's side in the controversy. The findings of the Trial Examiner and the Record are full of sarcastic remarks and statements by him which seriously reflect upon his conception of the judging process.

The substantial elements of due process demand that there be a hearing by a fair and disinterested person capable of making impartial findings based upon the complaint and gathered from the evidence. The rudimentary requirements of fair play demand a fair and open hearing, essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an inexorable safeguard. *Morgan* v. *United States*, 304 U. S. 1; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 (opinion of Justice Brandeis); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304; *Tumey* v. *Ohio*, 273 U. S. 510, 535.

In *National Labor Relations Board* v. *Ford Motor Co.*, 114 Fed. (2) 905, 909 (C. C. A. 6), the Court said:

> "We may accept as fundamental the axiom that a trial by a biased judge is not in conformity with due process of law."

The Court refused to set aside the order in that case because the Trial Examiner had not made any special findings; but in this case all the findings of the Trial Examiner (except those relating to Earl Freeman's claim of discrimination) have been adopted in substance by the Board.

In the *Inland Steel Company* case, where the Trial Examiner indulged in a similar performance, the Circuit Court of Appeals for the Seventh Circuit said:

"Another attack made upon the Examiner arises from his alleged hostile and coercive examination of witnesses. It is argued his conduct in this respect demonstrates that he was acting as a partisan on the Board's side, rather than in a judicial capacity. . . . We are forced to the conclusion that the conduct of the Examiner in this respect plainly discloses he laid aside all semblance of serving in a judicial capacity. . . .

"That a trial by a biased judge is not in conformity with due process is sustained by the authorities. . . .

"The Board argues that even though the criticism directed at the Trial Examiner be justified, yet the order should not be set aside because petitioner has failed to prove that its case was prejudiced, or that any evidence favorable to it was kept from the record. . . .

"We see no way in which the injustice done by this character of hearing can be righted except by setting aside the order of the Board in entirety and remanding the case to it for a new hearing before another Examiner and a determination by the Board upon the record to be made upon such new hearing."

In *Montgomery Ward & Company* v. *National Labor Relations Board*, 103 Fed. (2) 147, 156 (C. C. A. 6), the Court held, with reference to the bias of the Trial Examiner:

"Instead of maintaining the impartial position of one who is to determine—in a preliminary stage—the ultimate facts and action thereon, he assumed the place of attorney supporting the complaint. . . .

* * * * * * *

"This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable to the company or the intervener while similar action does not appear as to witnesses favorable to the complainant. . . . Counsel

> for the Board seems to have been proficient and this exaggerated participation by the examiner is not commendable—it is likely to, and it did here, shade into partisan activity."

In *National Labor Relations Board* v. *Washington Dehydrated Food Company*, 118 Fed. (2) 980 (C. C. A. 9), the Court held:

> "Throughout the record the Trial Examiner showed a woeful lack of judicial poise, and there are repeated incidents in the record which indicate that he was determined to make a case against respondent and other manifestations of a disposition on his part to intimidate the witnesses to further his purpose."

In each of these cases the Court refused to enforce the order of the Board based upon a hearing conducted by a biased Trial Examiner.

See also *Berkshire Employees' Association* v. *National Labor Relations Board*, 121 Fed. (2) 235 (C. C. A. 3), where it was held as to one isolated act of partiality by a member of the Board (who sat in the present case), if proved, would disqualify the member.

It should be noted here that the hearing was held in 1938 and preceded all of the above decisions of Circuit Courts of Appeals, and practically all of the cited applicable decisions of the Supreme Court of the United States. At the time of this hearing there did not seem to be any well-settled understanding by these quasi-judges of any limitation upon their power. It was tried under a philosophy that some administrative agencies are set up to be, and are intended to be, partial, and they are not expected to proceed after a full and fair hearing.

As to the requirements of impartiality of Trial Examiners and as to the attitude of this particular Trial Examiner, see Intermediate Report of Special Committee of the

House of Representatives, to Investigate National Labor Relations Board, 76th Congress (March 30, 1940) House Report 1902, p. 37; Testimony Vol. II, p. 11.

It is no answer to say that the Board might have disregarded all of the advocacy, misconduct and improprieties of the Trial Examiner, and yet upon the record made the findings contained in its decision. It cannot be said that the Board did disregard the findings of the Trial Examiner or that it was not influenced by them. It was aptly held in *National Labor Relations Board* v. *Prettyman*, 117 Fed. (2) 786 (C. C. A. 6):

> "Even if the orders of the Board were justified by the facts . . . the necessity of according due process of law to the respondents is not obviated."

This Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, said the requirement that the inexorable safeguard of a fair and open hearing be maintained in its integrity is so compelling, there can be no compromise in a case where the requirements have been neglected or ignored.

Finally, on this branch of the case, we refer again to the facts shown in 4 b of the petition to refer back (R. 852, 853). When the Examiner, before hearing the respondent's evidence, suggested to the attorney for the respondent that he consent to the relief requested in the complaint and was given the most weighty reasons why this should not be done, and replied:

> "Well, your company will be required sometime to recognize B-9 and you might as well do it now." (R. 853),

he showed plainly he had prejudged the merits of the controversy and favored the charging union.

The order of the Board based on his report is void and should not be enforced. In any event, if there is to be,

contrary to what we have urged, inquiry by this Court now as to there being substantial evidence to sustain the Board's findings, the study should be made in the light of the extreme bias of the Examiner on whose report the findings were based.

V. THE ASSOCIATION WAS AN INDISPENSABLE PARTY

As previously shown, the Board changed its rules, effective July 14, 1939, before the report of the Examiner was made on July 27, 1939. So, Michiana could have been made a party. That it was not is evident from its having moved in the Court of Appeals for leave to intervene (R. 863) and stating in its proposed intervening petition (R. 864, par. 3) it was not made a party and received no notice of the proceedings or hearing. Immediately following the decision in the *Consolidated Edison* case, *supra*, an amendment of the complaint, not of the charge, was tendered on December 7, 1938, and permitted by the Examiner to be filed. While termed an amendment, it was really a wholly different accusation than any made in the charge (R. 30) or complaint. The company objected to the granting of the permission to amend (R. 376-8), renewed its objection in the motion to dismiss at the close of the proceedings (R. 630-635), and made the amendment the subject of exception 67 (R. 123).

The charge was not amended and the permitted amendment of the complaint is very different from that sanctioned in *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 369; also, here, Michiana, representing member employees, wishes to be heard (*id.* p. 370).

This situation should be governed by the *Consolidated Edison* case, *supra*. At p. 201 of that case, it was decided the Brotherhood there having an interest in the contract was entitled to notice and a hearing before it could be set

aside. In *National Licorice Co.* v. *N. L. R. B., supra*, the agreements were illegal on their face. They were individual contracts (p. 355) instead of with a bargaining agent and prevented demand for a closed shop, or a signed agreement with an employer or bargaining regarding discharges (p. 360). As such agreements are in violation of the Act, there was illegality as matter of law and no one, party or not, could give them validity. Here, the terms of the contract as written are not illegal and, hence, Michiana should not have its rights thereunder invalidated without being a party to the proceeding. The Examiner and the Board would have derived benefit had Michiana been made a party: the Association could better have conferred with witnesses belonging to it and tendered their evidence than could the company, an adversary party in the bargaining for wages, etc.

VI. THE EXPERIENCE OF ALMOST FOUR YEARS SINCE THE EVIDENCE WAS TAKEN AND CHANGED CONDITIONS SHOULD BE CONSIDERED BY THE BOARD, THE FORMER, AS BEARING ON WHETHER THERE WAS REALLY SUBSTANTIAL EVIDENCE FOR THE BOARD'S FINDINGS, AND WITH THE LATTER, AS BEARING ON THE RELIEF, IF ANY, THAT SHOULD BE GIVEN

The Board, not the Company, is responsible for the interval that has elapsed between the time of taking testimony and submission to this Court. It is of the utmost urgency that there should not be, especially under existing conditions, a result which will impede the operations of an essential utility serving those engaged in the war effort. It has been conclusively (for this review) demonstrated that B-9, its officers and members, dynamited the company's plant in an attempt to interfere with the proceedings before the Examiner and the Board, to deprive the men of

their right to bargain voluntarily through a representative of their own choosing, and to force B-9 on them and on the company as bargaining agent for its employees. As said in the opinion of the Court:

> "An employer would hardly be expected to willingly deal with a labor organization which had criminally destroyed his property" (R. 875).

The Board, not a court, is to determine, we know, what relief it will afford. But this is not to say that the Board may grant relief which it would not have granted had it received evidence showing that its intended relief would not effectuate the purposes of the Act and would encourage conspiracies and deeds of criminal violence aimed at the employer and at the Board itself. Also, as the contract ordered set aside between Michiana and the Company has been carried out, and years of bargaining with renewals have elapsed, it is pertinent to inquire, at this time, whether Michiana, which B-9 seeks to supplant, under all the circumstances, if there was any defect in its inception (which we deny), has not by this time shown its independence and satisfactory character as a bargaining agent through the intervening years.

In *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 129 Fed. (2) 661, 667 (C. C. A. 5), in a similar situation, the Court said that

> "under the circumstances in which the country now stands, it would be a useless, if not foolish thing for this court to undertake now to determine whether evidence taken in 1937 supports the order made in 1940 and should be enforced in 1942."

The Board as now constituted, and under existing conditions, if it received the evidence of violent plot by B-9, its officers and members, against the Board and against

the purposes of the Act it administers, would not be likely to make an order, at the instance of such union, that would further its criminal purposes. In *In re Monsieur Henri Wines, Limited*, decided October 19, 1942, N. L. R. B. No. C-2084, the Board decided that a closed shop contract, though negotiated under Sec. 8(3) of the Act with a union which had accepted membership applications of a majority of employees, but did not admit them and distributed their jobs to non-employee members of the union was fraudulent, an unlawful device and would not be enforced.

Again, if it should appear that Michiana has been for years and is a sturdy and independent bargaining unit wholly free from attempted company interference and highly satisfactory to its membership, the experience with its character and operations would have a bearing on whether it was really organized at the instance of the company or as the voluntary choice for bargaining of the men.

CONCLUSION

The Court of Appeals, in ordering remand, exercised the jurisdiction and discretion expressly conferred on it by Sec. 10(e) of the Act. The Court did not make its decree arbitrarily. On the contrary, the judgment may be supported by reason. The Court did not decide whether the order of the Board is sustained by substantial evidence and properly left other questions undetermined. The practical effect of a reversal would be to aid in substituting for the Association the charging labor organization, guilty of felonious crimes of violence and conspiracy, and of coercion and intimidation; to deprive employees of rights guaranteed to them by the Act. Whether there was substantial evidence and whether the relief was proper ought not be determined until full ascertainment of the circumstances preceding and surrounding the filing of the charge, the taking of the testimony and in the light of subsequent

events. But, apart from these factors, and on the present record, should the Court be of opinion it ought to enter on the inquiry, there is no substantial evidence to sustain the Board's order. The decree of remand should, therefore, be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1942.

National Labor Relations Board, Petitioner, vs. Indiana & Michigan Electric Company, and Michiana Electrical Utility Workers Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 18, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

The court below granted respondent Indiana and Michigan Electric Company's petition to remand the case to the Labor Board to hear additional evidence as to a course of depredations, including dynamitings, committed, it is alleged, by Local B-9 of the International Brotherhood of Electrical Workers, on the Company's properties during the pendency of the case. It directed that the Board make findings on such evidence, include it in the transcript, and make such modifications, if any, in its order, as the evidence might require. The court expressly refrained from passing on questions as to the bias and partisanship of the Trial Examiner and the sufficiency of the findings and of the evidence raised by the Board's petition for enforcement and the answer thereto. The importance of the questions raised to enforcement of the Act prompted us to grant certiorari.[1]

For present purposes we take to be true the facts stated in the petition or offer of proof on the basis of which the court below directed a remand. These facts were stated on oath, and have not been denied. Petitioner says that we must hold that even if true they are immaterial. On this assumption of truth the case is as follows:

On November 12, 1938, Samuel Guy, the Business Manager of Local B-9 of the International Brotherhood of Electrical Workers, filed in amended form with the Board charges that the Company had been guilty of several unfair labor practices. On the same

[1] 316 U. S. 657. The decisions below are reported at 20 N. L. R. B. 989 and 124 F. 2d 50.

day the Board through its Regional Director issued a complaint against the Company, setting November 28, 1938, as a hearing date, and events of violence ensued in the following sequence as related to the Company's steps in defense of the case:

The Company filed its answer on November 23, 1938. On the following day, four days before the hearing, cables at one of the Company's South Bend substations were dynamited. The hearings proceeded, and the trial examiner's intermediate report recommended generally against the Company.

On September 1, 1939, the Company filed its exceptions to the intermediate report. On September 5, three of its transmission line poles were sawed off, and on September 8, a transmission line tower was dynamited. On October 17, 1939, the oral hearing on the exceptions was set before the Board at Washington for November 9, 1939. Two days later another transmission line tower was dynamited. On October 28, two transmission poles at different locations were dynamited. Another transmission tower was so destroyed on October 30, ten days before the oral hearing, and two more at different parts of the system on November 23, 1939. All carried high voltage lines, and some were located along public highways or railroad tracks.

On February 19, 1940 the Company filed with the Board a petition to reopen the case and receive further evidence. This petition alleged the commission of the depredations upon its property as set forth above and further that: John R. Marks, Assistant Business Manager of Local B-9, and Earl Freeman, one of its members, both of whom had been witnesses against the Company, and three others, were arrested after February 1, 1940, and charged with the commission of some or all of the depredations, and with having conspired to commit them all. Except Marks, each had made confessions stating that Marks paid them sums of money aggregating $2,325 for committing such acts. One of them stated that Marks had caused the first dynamiting to intimidate the Company in connection with the hearing and three stated that he had caused the later ones to intimidate it in connection with the oral argument. The Company proposed by the evidence of dynamiting to discredit Marks and Freeman, on whose testimony the Trial Examiner appeared to rely. It also sought to discredit Guy, who also had been a witness, on the claim that he knew, or must have known, of the use of the $2,325 of the Union's money for the purpose of destroying respondent's property. But it claimed more. It asserted evidence of a conspiracy to destroy property to influence the pending case,

which it contended was not a good-faith labor controversy, but an unlawful effort of Local B-9 to coerce the Company to require its employees to join the union.

On February 28, 1940 the Board denied the Company's petition. It held that "the matters recited therein have no relation to the issues in this proceeding." The Board went on to make findings on the issues, expressly reciting that it did so "upon the entire record in the case." While the Board did not designate all of the testimony for printing, it has certified it all to us, it has stricken no testimony of any witness in question from the record and has made no finding that any specific parts of it were not relied upon.[2]

The report of the Trial Examiner, Dudley, had held the Company's attitude to be hostile and obstructive toward the effort to unionize its men, relying substantially on events as to which Guy, Marks, and Freeman had testified. The Board findings made but little reference to the activities of Guy and no reference at all to Marks, but reached the same conclusion as to the attitude of the Company. The examiner had recommended ordering immediate and full reinstatement of Freeman and that he be made whole for all lost wages. The Board did not follow that recommendation. The examiner had recommended an order that the Company withdraw all recognition from respondent Michiana Association as representative of employees upon the ground of company promotion and domination, and the Board so found and so ordered. The examiner had also recommended that the Company be ordered to cease and desist coercing employees in their right, among other things, to "join or assist the International Brotherhood of Electrical Workers, Local B-9." The Board order dropped the name of the union, but ordered respondent generally to cease and desist from interfering with its employees in the exercise of their rights "to join or assist labor organizations."

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[2] Section 10 of the Act provides: "(c) The testimony taken . . . shall be reduced to writing and filed with the Board. Thereafter, in discretion, the Board may upon notice take further testimony or hear argument. . . . (d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it. (e) The Board . . . shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to . . . enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree . . . ." 49 Stat. 454, 29 U. S. C. § 160.

On December 13, 1940, the Board petitioned for enforcement of its order and on July 29, 1941, the Company petitioned the Circuit Court of Appeals for a remand to the Board pursuant to § 10 (e) of the National Labor Relations Act. This petition referred to the earlier petition to the Board and set forth under oath in addition that: Marks, Freeman and another member of the Brotherhood had been convicted of one of the dynamitings described in the petition and sentenced to terms of from two to fourteen years in the state penitentiary; and two others had pleaded guilty of other of the depredations. Marks had said he obtained all of the money to purchase dynamite and pay the dynamiters from the treasury of International Brotherhood of Electrical Workers, Local B-9. The petition also recited that during the hearings the Trial Examiner asked a conference with the Company attorney and urged settlement of the case. He was told of the dynamiting of November 24, 1938, and given references to articles about the practices and methods of the officers of this union, and to the record in *Boyle* v. *United States*, 259 F. 803, in which the Circuit Court of Appeals for the Seventh Circuit had affirmed a conviction of Michael J. Boyle, its International Vice-President, and severely condemned his methods in labor matters. The examiner replied, "Well, your Company will be required some time to recognize B-9 and you might as well do it now." On three separate later occasions different attorneys or officers of the Board were informed of the depredations, but continued to urge the Company to cease resistance in the case. The truth of these statements has not been denied. Finally, the Company asserted in its petition to the Court that on reopening it would be able to prove that the Board's witnesses (not limited to Guy and Marks and Freeman) were of such character that they are not entitled to credit and belief, and that the case had no relation to the purposes of the National Labor Relations Act.

The court below stated as one ground of the Company's case for remand that the tendered evidence was material for the purpose of "impeaching the credibility of witnesses before the Board on whose testimony the Board relied for its finding of ultimate facts." After referring to the testimony of Guy and Marks, it said that "at the time of the trial, the evidence adduced on the trial of the criminal cases in the Indiana State Court involving these witnesses, was not available to respondent or to the Board. The new evidence is of such character that its consideration by the Board would probably produce a different result." In support of its remand

it went on to say that the question whether the supervisory employees whose activities had been found by the Board to constitute coercion on the part of the Company "were acting on their own behalf and that of their co-employees, or at the behest of the respondent, is the crux of the case. . . . The new evidence may throw some light on the issue of employer domination."

Section 10(e) of the National Labor Relations Act authorizes the Circuit Court of Appeals to order additional evidence to be taken when it is shown "to the satisfaction of the court that such additional evidence is material," and that there were reasonable grounds for the failure to adduce the evidence at the hearing.[3] In *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104, we sustained the Board's contention and held that an application for leave to adduce additional evidence thereunder "was addressed to the sound judicial discretion of the court." The Board does not suggest that a different construction should be put upon the Act when the court below decides against, rather than for, it. The question it has submitted for our decision is whether the court below "acted arbitrarily" and "abused its discretion." Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence of dynamiting would be a matter of indifference in our own view of the case, but that the court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on the sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must not only have been in error but must also have abused its judicial discretion.

The Board argues that the decision below must be reversed on the grounds that the court erred in holding that misconduct of the complainant before the Board would go to the Board's jurisdiction; that, as it contends, the court held that a remand might result in the impeachment of the credibility of Guy, Marks and Freeman, whose testimony was either cumulative (being corroborated by other witnesses) or entirely immaterial and not relied

[3] 49 Stat. 454-455, 29 U. S. C. § 160(e):

"... If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. ..."

upon by the Board; and that there is other substantial evidence in the record to support the Board's decision. The specifications of error in the petition for certiorari did not, however, take this narrow compass, but extended to the propriety of the ruling of the court below upon the whole case.[4] We have not confined ourselves to the scope of the Board's view of the case; and have examined all the evidence in the certified transcript, and not merely the evidence set forth in the printed record.[5]

We cannot agree with the view of the Circuit Court of Appeals that the evidence might disqualify Local B-9 from making the charge of violation against the Company or deprive the charge of force and effect, and thereby defeat the Board's jurisdiction to hear the case.

The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee.[6] In the legislative hearings Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it was often not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge.[7] The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading. Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry.

While we hold that misconduct of the union would not deprive the Board of jurisdiction, this does not mean that the Board may not properly consider such misconduct as material to its own de-

[4] "1. The court below erred in remanding the case to the Board for the taking of additional evidence as to the unlawful conduct of the union which filed the charge against respondent.

"2. The court below erred in remanding the case to the Board in order that the testimony of certain witnesses might be impeached.

"3. The court below erred in failing to enforce the order of the Board."

[5] Stromberg v. California, 283 U. S. 359, 368; McCandless v. Furlaud, 293 U. S. 67, 71.

[6] § 10(b), 49 Stat. 453, 29 U. S. C. § 160(b) provides that "Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint. . . ."

[7] Hearings before the Committee on Education and Labor, United States Senate, 74th Cong., 1st Sess., on S. 1958, Washington, Government Printing Office, Part 3 (1935), pp. 439-442.

cision to entertain and proceed upon the charge. The Board has wide discretion in the issue of complaints. Indeed it did not act on a charge earlier made by the C. I. O. against the same employer. It is not required by the statute to move on every charge; it is merely enabled to do so.[8] It may decline to be imposed upon or to submit its process to abuse. The Board might properly withhold or dismiss its own complainf if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process.

The Company claims support for this inference as to the purpose of the organizers in the testimony of Guy, Business Manager of Local B-9. It appears that he and Marks, his assistant, called on Thomas F. English, operating head of the Company, in the Spring of 1937. Guy testified that the purpose was "along the lines" of getting the assistance of English in causing the employees to come into Local B-9 instead of into a C. I. O. union or an independent union. Guy said, "we decided" to "take over the organization" of the men, that "we had jurisdiction in this particular community or part of the State, and if they were going to be organized that they rightfully belonged in our organization." Their proposition to the Company that it cause the men to join Local B-9 was a proposal to violate the National Labor Relations Act, whose purpose is to protect the workmen from employer pressure and leave them free to choose for themselves whether, and with whom, they

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[8] Compare the following statistics on the disposition of charges filed with the Board:

	Percentage of total cases on docket for fiscal years ending:			
	1937†	1938‡	1939*	1941**
Cases closed before issuance of complaint:				
By settlement	32.1	34.5	27.9	30.3
By dismissal	13.5	13.4	7.6	9.7
By withdrawal	7.4	17.7	17.8	20.6
By other means	.2	1.2	.5	.2
Cases disposed of after issuance of complaint	3.0	2.5	5.5	6.6
Cases pending	43.6.	30.7	40.7	32.7

† Report of the National Labor Relations Board (1937) 20.
‡ Report of the National Labor Relations Board (1938) 31.
* Report of the National Labor Relations Board (1939) 34.
** Report of the National Labor Relations Board (1941) 26.

Statistics for 1940 are set up on a slightly different basis, but indicate a trend like that of the years set forth above. Report of the National Labor Relations Board (1940) 20.

will associate. The Company refused, and English later warned that the organizers must cease representing to the men that the Company favored Local B-9.

Later another meeting was called by a Field Examiner for the National Labor Relations Board, attended by the Field Examiner, Guy, Marks and Company representatives. On questioning, Guy recalled that Boyle, Vice-President of the Brotherhood, had also been there. The Company attorney made an offer of proof at the hearing that this meeting was held on May 5, 1938, at the instance of the Field Examiner, who stated that a series of incidents recited constituted a violation by the Company of the Labor Relations Act and "asked Mr. Boyle what recommendation he would make." The Trial Examiner rejected the proof.[9]

Apart from the materiality of the additional evidence on the question of the Board's discretion as to whether it would institute or continue a case on the recommendation and charges of this informer under the circumstances now appearing, its materiality on other branches of the case is sufficiently established to support the Court's exercise of discretion in ordering taking of new testimony. We think this course of violence and lawlessness concurrent with the Board proceedings, apparently instigated by those who stand to gain from the Board's decisions, participated in by parties and witnesses, may not be said to lack possible materiality on other issues of the case. The question goes to the fairness of giving absolute finality to the Board's findings of fact where there has been a refusal to hear and incorporate in the record such evidence as may be produced of such a conspiracy.

The testimony ordered to be heard goes to the credibility of Marks and Freeman, and perhaps to that of Guy, three witnesses whom the Board's staff thought useful to call, and on whom the examiner plainly relied. The Board expressly accepted and relied upon the version of events as to which Guy testified.[10] Local

[9] This was on November 28, 1938, the first day of the hearing. On December 9, 1938, the last day of the hearing, Charles B. Calvert, English's assistant, testified without objection that Boyle's response was "I guess that is about it."

[10] The Board found that: Earl Livelsberger, one of the Company's general line foremen, and Glenn Carlton, his assistant, were among those invited to attend a meeting of Local B-9 in April, 1937. During the course of the meeting, Guy, learning from several Company employees that they were sitting in a car outside the meeting hall, left it and invited them to come to the meeting. Carlton declined, stating that he could get the information anyway. Carlton and Livelsberger were in a position to observe, and did observe, who attended the meeting. "The fact that Guy's attention was called to the presence of

B-9 was a party to the proceeding and appeared throughout the hearings by Guy, who managed its interests. He, the Business Manager, was the first witness; and Marks, his assistant, the second. Aside from English, operating head of the Company, and employees who were members of what the Board found to be a company-dominated union,[11] the Board called twenty witnesses. Of these, fourteen besides Guy, Marks and Freeman, were affiliated with Local B-9.[12] Of these fourteen, eight had come to work shortly before or during Local B-9's organizing campaign which, as Guy and Marks testified and the Board found, began in the Fall of 1935.[13] One of these, Buckley, admitted knowing Boyle, and Marks testified that he knew Buckley before he came to work for the Company. Marks also testified that he began organizational efforts by getting in touch with Buckley and Shields, who, like Buckley, came to work in 1935. Buckley called the first meeting

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Livelsberger and Carlton indicates that the respondent's employees were aware of the supervisory surveillance of their meeting place. . . . Although Livelsberger and Carlton were invited to the meeting and therefore their attendance at the meeting itself would not have discouraged membership in the Brotherhood, it is clear, and we find that their stationing themselves outside the meeting place was for the purpose of scrutinizing those who entered and thereby discouraging employees from attending such meetings." It also found that since Livelsberger and Carlton were supervisory employees whose activities were attributable to the Company, their conduct constituted a violation by the Company of the rights guaranteed the employees in § 7 of the Act.

Carlton and Livelsberger, called as witnesses for the Company, admitted being across the street from the hall at the time of the meeting. Livelsberger testified that he had belonged to the Brotherhood for three years after 1919, but got "disgusted" and dropped out; and that he did not go into the meeting because "I didn't see anyone there that I cared much about association in membership with." Carlton testified to the same effect as to his reason for staying out. There were about fourteen men at this meeting, including Claude F. Buckley, Dewey Edwards, Guy, Albert Otis and Lester Shields.

Frank Claeys testified that he saw Carlton outside, and "wanted to get out of there," but that he had nevertheless attended the meeting. Guy testified that Buckley, and probably others, had told him of Carlton's presence outside the hall, and that when he went out and invited Carlton to attend and learn firsthand what was going on, he was told by Carlton that he would get the information anyway. Ralph L. Hoblitzel was the only one to corroborate this statement, and Carlton denied having made it.

As to Buckley, Claeys, Edwards, Hoblitzel, Otis and Shields, all Board witnesses and affiliated with Local B-9, see the following discussion.

11 Witnesses presented by the Board and affiliated with respondent Michiana were: Geraldine Carlson, Ray M. Collins, Taylor Edgell, George S. Holmes, and Nelson D. Lambert.

12 Claude F. Buckley, Frank Claeys, Ernest Durfey, Dewey Edwards, Forrest Elkins, E. J. Ernst, Charles A. Havlin, Ralph L. Hoblitzel, Walter Hulwick, Russel H. Kidder, Eugene S. Lee, Albert Otis, Earl Seeley, and Lester Shields. Three other of the Board's witnesses were affiliated with the C. I. O.

13 Otis, April, 1935; Edwards, May, 1935; Buckley and Hulwick, July, 1935; Shields, August, 1935; Durfey, October, 1935; Seeley, October, 1936; Elkins, May, 1937. Kidder came to work in September, 1934.

for Local B-9 among the Company's employees. Edwards, an officer of Local B-9, was another of the new employees who figured in the case. He testified that he had known Marks for approximately four years and had seen him "quite a number of times" and in "a number of places." Otis, another 1935 arrival, went from Chicago, where he was employed at the time of the hearing, to South Bend to see a sick friend whom he had not seen or corresponded with for a year. On the way he happened to see Edwards out in a field hunting, and talked to him there. This was around Thanksgiving time of 1938. The South Bend substation was dynamited November 24, 1938. The Company attorney on cross-examination asked "What did you talk about?" Otis answered: "That is none of your business either." The Board attorney then objected to the question, which was never answered beyond a denial that they talked about the Company. Otis was twenty-seven years old at the time of the hearing and had worked for at least ten public utility concerns and one manufacturing plant in a short period. Asked on cross-examination the reason for his peculiarly acute memory in respect to the period of his employment by another electric company, he answered that it was because "an incident happened that isn't any affair of the court." Freeman, one of those convicted of the dynamiting, was a witness, testified at length as to alleged unfair practices of the Company, as did others affiliated with Local B-9, including those mentioned above.

It is idle in this context to say that because the Board now denies it relied on the evidence of the two who were convicted, because it was willing to omit their testimony from the record, and because it rejected the examiner's recommended relief to Freeman, the door should be closed to any inquiry about the knowledge or responsibility of members of this group for these acts of violence. The items recited and many others revealed by the transcript of testimony, as well as the printed record, give support for the lower court's belief that the evidence, if taken, might change the results. The convicted witnesses and many of the others on whom the Board must have relied were not only co-members of Local B-9, but they were cooperating in promoting its fight against the Company. It is unrealistic to say that this union was granted nothing by the Board's order or that no relief has been given to this particular union. The C. I. O. had practically withdrawn[14] and the

[14] A C. I. O. charter had issued to a group of Company employees in April, 1937. This group met with little success, and, failing to get the assistance of an organizer from the main body, the men transferred to Local B-9 in October, 1937.

Board's order disestablishes respondent Michiana. This not only leaves the field free to Local B-9 and breaks up the only center of resistance to it, but the Board prohibits any interference with the employees' right "to join or assist labor organizations." That includes this one, and for practical purposes at this time, none other. Local B-9 was the complainant, its effort to organize was at stake and the relations shown are such that cross-examination to ascertain whether the witnesses had any part in such violence would appear proper. It must be remembered that not only is the credibility of these men involved, but the decision itself turns on an interpretation of their acts and of the acts and attitudes of supervisors toward them and whether the employees were in good faith in testifying to the reasons for preferring an association of their own to Local B-9. We see no reason why witnesses so identified with the organizing effort of the dynamiters should not be questioned on a subject that might reveal bias in their testimony and might also explain acts of alleged discrimination against them.

We especially see no reason for holding that officers or members of Local B-9 should be spared such inquiry when the subject was thought by the Trial Examiner a fit one on which to examine the head of the employees' association. One George S. Holmes was president of respondent Michiana, which the Board holds to be the product of unlawful company activity and orders to be disestablished. He was a distribution engineer who had been employed by the Company for many years. After testifying to his understanding of the reasons for the formation of Michiana as being the fact of outside organizations "creating a disturbance and jeopardizing the present working conditions," the relative amounts of dues[15] and directness of approach to the company officials through Michiana,[16] he was questioned by the Trial Examiner. One of the questions put by the Trial Examiner was "Supposing that there was an organization formed to throw bombs at the company's plant every Saturday night, would you become president of such an organization?" Holmes said that he doubted that extremely. The

[15] Marks testified that dues in the Brotherhood were 1½% of average earnings, and initiation fees $10 for journeymen and $7 for helpers. Dues for Michiana were 25¢ per month, with an initiation fee of $1.

[16] According to the testimony of Guy and Marks, grievances as to wages and working conditions were considered by local bodies set up within B-9, and then referred to Marks, who would endeavor to adjust them. If he failed, the matter would be taken up with Guy in Chicago, who, with the executive board and membership of the main body—variously stated by Guy to number from 2,500 to 3,500—would decide the matter. Local bodies apparently had no power to settle their own grievances by approaching the management.

examiner also asked him, in connection with his attitude as to the proper technique of bargaining with the Company, "Would you suggest cutting down electricity and turning off electric lights?" He was told by Holmes that " . . . if you get the entire community adversely prejudiced against you, you would have tough going, regardless of how you acted toward the company." If questioning as to hypothetical bombings was deemed material and relevant to discredit Holmes' claim of independence of Company domination, which is the only purpose apparent, we would think it a little difficult to contend that it is improper to inquire as to the attitudes of those closely associated with those convicted of actual bombings as to their knowledge and attitude in relation to them.

It is at least reasonably conceivable that further inquiry into the depredations will bear not only upon the effect to be given the testimony of any further participants or conspirators thereby disclosed, but also upon that of witnesses whose testimony might without such inquiry be taken to indicate Company domination of Michiana. Many supervisory and other employees voiced opposition to the intrusion of "outsiders" into their affairs.[17] Present knowledge and further investigation of the depredations seem not altogether unlikely to lend credibility to their testimony that they had acted to protect their own interests and not as participants

[17] Two examples suffice:

The Board made a number of findings with respect to the activity of Jack Betly, a lineman employed by the Company since 1929, who had been particularly active in the organization of Michiana. It quoted from a petition which he had circulated. The petition was entitled "S. A. F. E.", and read in the part quoted by the Board as follows: "We, the older men in the employ of this company, believe that we have men among us that can intelligently arbitrate with the management without resorting to radicalism and dictation of outsiders. Our meeting will be posted in the near future." Some time before Betly got out his petition he had been solicited by Otis, Shields and Marks to rejoin the Brotherhood, to which he had belonged in 1915. According to his testimony, they had called him out in the evening to their car, and had refused to come into his home, thus causing him some uneasiness. He was invited to attend, and did attend, the first Local B-9 meeting. He testified further that at a later meeting he had difficulties with Otis, who "took a slough" at him and bumped his head against a wall, and that shortly after this he went home and got out his petition.

The Board also quoted at some length from the testimony of Harter, a foreman, as to his questioning of employees with respect to Local B-9 matters, and found that such questioning constituted a violation by the Company of the Act. His story was that the men he questioned were members of his line crew who had been acting "tight" and as though they had more on their minds than linemen working on charged inter-city power lines should have; that his questioning divulged similar visits by Shields and Otis upon two of the three men in his crew; and that outside unions were "bothering . . . I know I was wondering if they was going to move their trunks in and put up at my place, or whether I would have to move out and let them in."

in Company interference. Testimony of employees that they organized Michiana because they did not wish to accept the leadership of Local B-9, and that Michiana was the product of their own preference rather than of Company pressure or interference, has been wholly disbelieved by the Board. It might well be rejected when Local B-9 appears only in the light of an ardent but lawful champion of workmen's welfare. The testimony of many employees was critical of Local B-9, but the grounds were not clearly articulated. But their aversion to the B-9 leadership, disbelieved by the Board when no very tangible reason was brought out to explain it, may be entirely credible when it appears that even poorly explained apprehensions were justified and that there was ample reason for avoiding entanglement with the men who officered Local B-9 and who are now convicted—injuring no doubt the cause of those whom they were trying to "take over."

Undoubtedly an element of fair judicial discretion vested in the court below consists of respect for a wide range of discretion in the Board itself as to when it should or should not inquire into allegations of violence or threats of violence by witnesses or parties before it. It must not be overlooked, however, that the evidence on which the Court reopened this case was substantially different from that on which the Board refused to do so.[18] Charges that violence has been threatened or encouraged are frequent and easy in negotiations that proceed in an air of belligerency. Both sides regard labor relations as tough business, and not only vital interests but passions and sensitivities as to prestige are involved. Neither side is lightly to be held answerable for acts where responsibility cannot be fixed. Few tasks of leadership are more difficult than those which confront those who represent labor. If they are gentle, they are often unheeded; and if they are blunt, they are often held up as menacing. The Board is not required to sidetrack proceedings involving an employer's violation of the labor law while it explores irrelevant derelictions of parties or witnesses or acts of unknown or irresponsible persons.

[18] Facts appearing in the petition to the Court not contained in the petition to the Board were: the conviction of men who had earlier confessed, and of Marks, who had not confessed; and the efforts by the Trial Examiner during the hearing, and by other attorneys or officials of the Board after the hearing, to get the Company to consent to disestablishment of Michiana despite charges that the Local had caused the dynamitings.

It also appeared from the Board's response to the petition to the Court that at least one of the non-employee dynamiters hired by Marks was also a member of the Brotherhood.

The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

We will not assume in the circumstances of this case that the Board will in any event refuse to modify its conclusions. Since the court below has not yet passed on the issue of sufficiency of the evidence to sustain the finding that Michiana is a company-dominated union, any assumption that it is such can be only tentative unless we are to deny the Company the right to review granted by the Act. One of the very issues yet to be decided, and on which the court below desires the light of additional evidence, is whether Michiana was, as its officers and members testified, a true employee organization, formed to get away from Local B-9, or whether it was a company tool, as the Board has inferred from testimony, much of it from Local B-9 sources. We have no warrant to assume that the Board will find that it is company-dominated, no matter what the additional proof may show as to the motives of the men who organized it. We do not prejudge the issue—we hold only that it is not unreasonable or an abuse of judicial power to reserve judgment on it until the full story has been heard and judged by the Board itself.

The Labor Relations Act contemplates submission of disputes as to labor practices of employers to reasoned and impartial determination after full and fair hearing. If by that procedure there is found wrong-doing on both sides, the Board can act to prevent the employer wrong-doing prohibited by the Act, even though it can not reach other wrong-doing. But the process of presenting cases to it must be kept free from forces generating bias or intimidation. Dynamiting or display of force by either party has no place in the procedures which lead to reasoned judgments. The influence of lawless force directed toward parties or

witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence, and it is proper that courts and administrative bodies so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies.

Further delay in this case is to be regretted, particularly in view of the long delay that has already occurred. We set out in the footnote the facts in this regard, which we do not recite as any criticism of the Board, which in turn has suggested no criticism of the Company.[19]

In view of the whole record the order of the court below is not arbitrary or unreasonable or an abuse of discretion. It is

Affirmed.

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[19] The complaint was served November 15, 1938 and the hearing set for November 28. A continuance was requested by the Company on the ground of illness of its attorney, but was refused. The Board presented its evidence in six days, the Company in three. The hearings closed on December 9, 1938, and the Trial Examiner's intermediate report was filed on July 27, 1939—a little more than seven months later. The Company's exceptions were filed September 1, 1939, and the Board set them for hearing on November 9, 1939. The Board had not decided the case when, on February 19, 1940, the Company petitioned it for a rehearing with regard to the evidence of the depredations obtained by the arrest of all, and the confessions of some, of the participants, all occurring since February 1, 1940. Nine days later the Board decided the case. On December 13, 1940, the Board petitioned the court below for enforcement of its order, and the court rendered its decision on December 12, 1941. On February 19, 1942, after the time for filing a petition for rehearing had expired, the Board moved for leave to file it out of time. The court denied the motion, and on March 9, 1942, three days before the time to petition this Court for a writ of certiorari had expired, the Board asked and obtained an extension of time to April 11, 1942, in which to file its petition. The petition was filed on that date, granted on May 25, and argument in this Court was completed November 16, 1942.

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1942.

National Labor Relations Board, Petitioner, *vs.* Indiana & Michigan Electric Company, and Michiana Electrical Utility Workers Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 18, 1943.]

Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Murphy concur, dissenting.

A desire to punish dynamiters does not justify a failure to protect respondent's employees, innocent of wrongdoing, in their freedom either to bargain collectively through representatives of their own choosing or to be represented by no one at all. Without relying in the slightest degree on the evidence of persons convicted of or charged with dynamiting, the Board found the Association to be company-dominated. Its order gave no benefit to anyone even remotely suspected of complicity in the crimes charged. Instead it carefully eliminated such individuals, and the Union, from the scope of its award and gave no credence to the suspect witnesses. The sole issue for the courts to determine is whether there is, in the testimony of witnesses untainted by any suspicion, sufficient evidence to support the Board findings that the employer has (1) set up a company-dominated union contrary to Sec. 8(2) of the Act, and (2) interfered with, restrained and coerced its employees in exercising their right to belong to the union of their choice contrary to Sec. 8(1). The Board order, requiring disestablishment of the dominated union and cessation of interference, contemplates only that this Company shall not intimidate or coerce its employees—that it shall leave them free. This freedom is their legal right; and crime by some of them cannot justify the company in destroying the freedom of all, or even a few of them. Under our government guilt is personal; it cannot, or at least should not, attaint the innocent; it cannot, or should not provide an excuse

for one injured by it to invade the liberty of others. In short, the crimes of some of these employees, or of the non-employee members of a union, cannot have relevance to the two issues the Board decided.

I agree with the Court that alleged errors in the administration of the hearing by the trial examiner or by the Board officials are not properly before us. Such questions can be considered when the case is properly reviewed by the court below. Having agreed with the Court that this question is now irrelevant, I cannot join in discussing, as the Court does, the propriety of alleged statements to one Boyle, and reserve all opinion on this phase of the case.

If the evidence respondent asks to offer has any relevance whatever, it must be for one of two reasons: that (a) the Union's purposes in filing the complaint were not salutary and that the character of its activities was such that the Board might upon hearing the proffered evidence decline to exercise any jurisdiction to protect the rights of employees, even the innocent; or (b) that the Board's witnesses were of such character as to be unworthy of belief.

The first of these grounds surely has no real merit. There is of course no reason why a meritorious complaint should be dismissed merely because of the bad character of one who makes the charge. The ill character of a complainant, or of witnesses, provides no excuse for leaving the public interest unprotected. A witness can be impeached in a proper manner; but the opinion here seems to suggest that administrative agencies should hereafter spend a large part of their time in trying complainants instead of those charged with violating the law. Now, four years after this proceeding began, it is broadly hinted that the Board should permit the employer to try the informer and it is clearly implied that if the complaining union is proved evil, the employees should not be free of company-domination no matter how extreme it may be. If the practice here suggested is not soon repudiated, a new method will have been provided in which to paralyze administrative agencies by discursive delay.

As has been noted, the Board has carefully eliminated from its order all provisions which would specifically benefit the Union, and I see no reason for ordering it to take new evidence of the character of a union to which it has granted nothing at all. Despite this there is a premise, vaguely stated but nonetheless permeating

the opinion of the Court, that evidence of the bad character of the Union would require the Board to take some other action; that somehow, as a practical matter, the Board, despite its careful effort to avoid such a result, has aided the Union which brought the charges. But if the desire be to punish the Union, I cannot agree that this should be done by compelling innocent employees to remain in a dominated Association. If the Board's order requiring the disestablishment of the Association is found to be supported by evidence, the employees may form a genuine independent union, they may join some other organization, or they may choose to remain unorganized. A requirement that, for their own good, they must remain in a company-dominated union to avoid any possibility of their aiding the wrongdoers denies them the freedom of choice which the Act preserves. Whatever character the Union may be found to have, the Board's protection to respondent's employees should not be disturbed because of it.

The motion for permission to offer new evidence attacking the credibility of witnesses raises a different question—one going to the quality of evidence on which a conclusion is to be reached. The Board, after full consideration, denied the motion because it found that the proffered evidence even if true had no relation to the issue of Company coercion of its employees. Whether a case shall be reopened after the evidence is closed, is, in courts, ordinarily a matter of discretion. I think the Board's action in this proceeding can not be said to be an unfair exercise of discretion and that in any event it was correct in holding the evidence irrelevant to the limited issues it decided.

It must be remembered that the fundamental issue which the Board decided here is whether the Association is company-dominated. We are told that testimony concerning the misdeeds of the electrical workers are material to this conclusion because the Board relied on witnesses Marks, Freeman, and Guy; because the Board "must have relied" on other union witnesses; because the Board's decision may drive the employees into the offending Union; because an Association official was asked hypothetical questions about bombing; and because Company witnesses might have been more credible if the full facts of violence had been known.

To support its view that the Board might have disbelieved certain of its witnesses had the full facts been known, the Court has gone not only to the testimony which has been printed by the Board and the Company and offered by the Board as the basis of its

case, but has searched evidence to which the Board has made no reference in its findings and which it has not offered as of any credibility at all. Evidently the Board is to be required to re-examine that evidence in which it has already, by rejection of it, expressed disbelief. I think no possible good can come from reconsidering evidence once rejected for the purpose of re-rejecting it.

The Board called sixteen Union witnesses. The three most under suspicion for dynamiting were Guy, Marks, and Freeman. Guy's testimony, as submitted by the Board in support of its finding, is that two company supervisors kept a Union meeting under surveillance, a fact conceded by the supervisors. Marks testified that the Company did not interfere with union organization, and Freeman testified that Holmes, president of the Association, was respected by his fellow employees. A more innocuous or colorless collection of evidence can scarcely be imagined. The testimony of six other Union witnesses, as reflected by the printed record, is equally trifling, while that of the other seven, which fills about four per cent of the printed record, was not relied on by the Board in its findings.

The ultimate Board holding before the Circuit Court of Appeals for review is that the Association was company-dominated. This holding rests almost exclusively on the testimony of Company witnesses or witnesses affiliated with the Association. There is not even a hint that these witnesses were intimidated or interfered with in any way, or that they told anything but the truth. If it be assumed that Guy, Freeman, and Marks are wholly unworthy of belief, this basic testimony given by Company witnesses would still be unaffected. The suggestion made by the Court, not raised by the Company either in its petition for rehearing to the Board or in its motion for remand in the Circuit Court of Appeals, that examination into the dynamiting will reflect on the attitude of the employees toward the Union during the earlier organizational period, therefore misses the heart of the case. If the Company's supervisory representatives did organize and dominate the Association, the Association is company-dominated and the Board's order should be upheld, *I. A. of M. v. Labor Board*, 311 U. S. 72, 79, 80; if it did not, the Board's order should not be enforced. The character of organizers of a separate and distinct union contributes nothing to the issue of Company conduct.

The last suggestion as to the materiality of further investigation into the dynamiting is that for some reason the trial examiner

asked Holmes questions concerning his view on violence in labor disputes. Holmes expressed a proper respect for law and order, and it is incredible that a new hearing would either cause him to alter his view in this regard or change the Board's respect for his conclusion.

It will not seem odd that so much of the evidence originally introduced by the Board was eventually deemed irrelevant to the final decision when it is realized that the original charge against the respondent was much broader than the final holding. This evidence, directed to the support of these peripheral charges, lost all consequence for this case when the Board declined to believe the charges themselves. For example, the original complaint alleged that one Elkins was wrongfully discharged. Since both the trial examiner and the Board found the charge unsupported, Elkin's testimony in this respect and all that supports it drops completely from the case. The opinion of the Court appears to require re-assessment of such surplus testimony offered in behalf of charges concluded to be unfounded.

Of course no Court should shelter dynamiters from exposure and inquiry. But compelling the Board to digress from the adjudication of a labor dispute in which such dynamiting has no part into a pursuit of the guilty, punishes the innocent employees of respondent rather than the evildoers themselves. The Labor Board is no fair substitute for a grand jury or a criminal court.

If the Board had denied respondents an opportunity to offer newly discovered evidence which tended to show that witnesses to material facts relied on by the Board had since the hearing been convicted of serious crimes affecting their credibility, I would not object to sending the matter back to the Board. But analysis of the record demonstrates that no such thing occurred. I think we should send the case back to the Circuit Court of Appeals for the normal review procedure.